

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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Court of Appeals of the District of Columbia

APRIL TERM, 1933.

No. 6068
Special Calendar.

447

THE UNITED STATES OF AMERICA EX REL. CHICAGO
GREAT WESTERN RAILROAD COMPANY, AND THE
KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY, THE
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANTS, KANSAS CITY SOUTHERN
RAILWAY COMPANY AND CHICAGO GREAT WESTERN RAIL-
ROAD COMPANY.

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BRIEF ON BEHALF OF APPELLANTS, KANSAS
CITY SOUTHERN RAILWAY COMPANY AND
CHICAGO GREAT WESTERN RAILROAD COM-
PANY.

STATEMENT.

This proceeding in mandamus was instituted to compel the Interstate Commerce Commission (hereinafter called the "Commission") to take jurisdiction of intervening petitions filed with it by appellants in a case then pend-

ing before it and known as its docket No. 15682, *Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company*, and to determine the rights of appellants. The Commission erroneously dismissed appellants' intervening petitions on the ground that it had no jurisdiction to afford the relief or determine the rights of the appellants asserted in said intervening petitions. The facts out of which this controversy arises are undisputed and fully set out in a report made by the Commission on November 10, 1925, in the case before it, which report is attached to the petition herein as Exhibit 5 and appears at pages 94 *et seq.* of the printed record. These facts may be briefly stated:

The Kansas City Terminal Railway Company (hereinafter called the "Terminal Company") is a Missouri corporation which was organized in 1906, for the purpose of acquiring, constructing and operating a new union station and terminal facilities in Kansas City, Missouri, and Kansas City, Kansas, for the benefit of ten trunk line railroads entering the old union station in said city. On June 12, 1909, an operating agreement (Part of Ex. 1 to Petition; Rec., 17, *et seq.*) was entered into in which each of the ten companies agreed to use the facilities of the Terminal Company and to pay its share of the expenses of said Terminal Company, including taxes, and interest and principal on its bonds, when due, as well as the expenses of operating and maintaining the Terminal Company's facilities. (Rec., 25, 26, 31.)

It was further agreed that if any using company defaulted in making its payments, the other companies would pay their proportion of the amount in default (Rec., 26), and the method of apportioning among the using or proprietary companies the amounts to be paid by them was also fixed (Rec., 25, *et seq.*; 31, *et seq.*)

The agreement further provided that the payment of its portion of the Terminal Company's expenses was a condition precedent to the right of any using or proprietary company to use the Terminal Company's facilities (Rec., 43, *et seq.*) On the same date (June 12, 1909) the same parties executed a stock trust agreement (Part of Ex. 6 to Petition; Rec. 136, *et seq.*) wherein they agreed to carry out the terms and provisions of the operating agreement and pledged their stock as security for such promise.

On January 12, 1910, appellants herein, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, became parties to the stock trust agreement and the operating agreement through the execution of a supplemental operating agreement (Part of Ex. 1 to Petition; Rec., 63, *et seq.*) and a supplemental stock trust agreement (Part of Ex. 6 to Petition; Rec., 162, *et seq.*) At the time of the proceedings before the Commission each of the proprietary companies owned \$183,333.33 of stock in the Terminal Company, and there was no other stock outstanding. This condition still obtains.

In conformity with said agreements the Terminal Company issued and sold \$50,000,000 of bonds secured by its properties then owned and thereafter acquired (Rec., 240), each of the proprietary companies, as above stated, agreeing to pay its numerical proportion of the principal and interest on said bonds as they became due. The expenses of the Terminal Company incurred in the maintenance and operation of its facilities were, by said operating agreement, to be paid by the using or proprietary companies on a user basis. The Terminal Company then proceeded with the acquisition of the properties necessary for its purposes and the construction and re-

construction of the necessary facilities, which now comprise the new union station and large terminals used for both freight and passenger service. The new station was put in operation in November, 1914.

Some of the using or proprietary companies then made, and still make, much more use of the Terminal Company's facilities than do other companies. There are four so-called large users and eight so-called smaller users. As a result of the terms and provisions of the operating agreement, appellants, which make very small use of the Terminal Company's facilities (2.61 per cent by the Chicago Great Western and 2.24 per cent by the Kansas City Southern, in 1932), each pay one-twelfth of the Terminal Company's interest and taxes, and their share, on a user basis, of the operating expenses of the Terminal Company; while the Atchison, Topeka and Santa Fe Railway Company, for example, makes 26.06 per cent of the total use of said facilities but still pays only one-twelfth of the taxes and interest charges of the Terminal Company. Exhibit 2 attached to the petition (Rec., 84) shows the percentage of use by each using line in 1932, the amounts paid by each on account of interest and taxes of the Terminal Company under the operating agreement and what each line would have paid for interest and taxes on a user basis.

As a result of this distribution of these charges, the cost to appellants for their use of the Terminal Company's facilities for the year 1932, for example, included \$190,836.96 paid by the Chicago Great Western and \$190,816.99 paid by the Kansas City Southern on account of interest and taxes, while the amount paid by the Santa Fe on the same account was \$195,303.56. Had these charges for interest and taxes been divided on a user basis, the Santa Fe would have paid \$599,655.32,

the Chicago Great Western \$60,057.57, and the Kansas City Southern \$51,543.67. In other words, in 1932, the division of interest and taxes under the operating agreement instead of on a user basis saved the Santa Fe \$404,351.76, while the excess cost to the Chicago Great Western and Kansas City Southern under the operating agreement was \$130,779.39 and \$139,269.82, respectively. (See Ex. 2, Rec., 84.)

Sometime prior to March 10, 1924, the property of the Missouri, Kansas and Texas Railway Company, one of the proprietary companies of the Terminal Company, was sold at foreclosure sale to the Missouri-Kansas-Texas Railroad Company, and this latter company refused to adopt the operating agreement. Its refusal to so adopt the agreement was later upheld by the courts. On March 10, 1924, the Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order pursuant to the provisions of paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company. The principal ground of the application was that the terms of the operating agreement were unjust, inequitable and burdensome, because the companies using the Terminal Company's facilities were required to pay the Terminal Company's interest and taxes on a numerical basis.

All of the proprietary companies of the Terminal Company were permitted to file intervening petitions in the proceeding thus instituted. In those petitions, the Terminal Company and the larger users alleged that the Missouri-Kansas-Texas Railroad Company should not be permitted to use the Terminal Company's facilities except in conformity with the terms of the operating

agreement, and the smaller users, including appellants, alleged that if the Missouri-Kansas-Texas Company were permitted to use the Terminal Company's facilities on terms more favorable than their own, similar relief should be granted them; also that the terms of the operating agreement were inequitable, unjust, unreasonable, discriminatory and unlawful. They prayed that all the companies using the Terminal Company's facilities should be permitted and required to pay for such use upon a fair, just and equitable basis. The intervening petitions filed by appellants were attached to the petition filed herein, as Exhibit 3 (Rec., 85, *et seq.*) and Exhibit 4 (Rec., 87, *et seq.*).

After hearings, the Commission issued a report on November 10, 1925 (Ex. 5 to Petition, Rec., 94, *et seq.*; 104 I. C. C. Rep. 203), finding that the Missouri-Kansas-Texas Railroad Company should be permitted to use the facilities of the Terminal Company, but dismissing the intervening petitions of appellants and the other small users on the ground that it had no jurisdiction under the law to alter the obligations imposed by the operating agreement upon the users of the Terminal Company's facilities. Notwithstanding this decision, the Commission indicated that the terms of the operating agreement were improper, saying (Rec., 117):

“In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a re-examination by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions.”

Three of the members of the Commission dissented

from the majority opinion in so far as it refused relief to the smaller users, and expressed the opinion that the charges made by the Terminal Company should be apportioned upon a user basis, or upon some basis more just and equitable than the numerical basis imposed by the operating agreement. (Rec., 231, *et seq.*)

Because of certain questions still unsettled in the Missouri, Kansas and Texas Railway Company foreclosure proceeding, and possibly for other reasons, nothing further was done in the proceeding before the Commission until March, 1931, when the Missouri-Kansas-Texas Railroad Company filed an application for further hearing to determine the amount of compensation which it should pay for its use of the Terminal Company's facilities. In April and May, 1931, and before any hearing was had upon the last mentioned application, appellants filed their petitions in said proceeding praying for a rehearing upon the order dismissing their intervening petitions. Said petitions for rehearing were denied on June 1, 1931.

Thereafter from time to time hearings were had on the application of the Missouri-Kansas-Texas Railroad Company, but the proceeding was still undisposed of when appellants, on May 31, 1933, filed their petition herein (Rec., 2, *et seq.*) for a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing appellants' intervening petitions and its order of June 1, 1931, denying their petitions for rehearing; and to compel the Commission to hear and decide the issues raised by said intervening petitions upon their merits. On June 7, 1933, the Commission filed its answer. (Rec., 201, *et seq.*)

The Terminal Company and the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island &

Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company were also permitted to intervene (Rec., 210, 229, 240) as respondents and thereafter filed answers (Rec., 210, *et seq.*; 229, *et seq.*). Under these answers and a stipulation made upon the hearing (Rec., 240, 241), the essential allegations of fact contained in the petition were admitted. Those facts are as set out herein and in the report of the Commission.

The cause came on for hearing in the Supreme Court of the District on June 22, 1933, on a demurrer filed that day by appellants to the answers theretofore filed by defendant and the interveners. (Rec., 238, 239.) Thereupon the court overruled the demurrer, and appellants electing to stand thereon, the court entered an order on June 23, 1933 that appellants' petition for writ of mandamus be dismissed but allowing an appeal to this Court. (Rec., 239.) On July 1, 1933, appellants filed their assignment of errors. (Rec., 241, *et seq.*) On July 6, 1933, they filed their designation of record (Rec., 242) and the record was filed in this Court on September 13, 1933. (Rec., 244.)

Since this case was docketed in this Court, there has been a development in the proceedings before the Commission. On November 13, 1933, the Commission issued a report on the application of the Missouri-Kansas-Texas Railroad Company for an order fixing the compensation which it should pay for its use of the Terminal Company's facilities. The cause still remains before the Commission, however, pending the filing and determination of petitions for rehearing and the entry of a final order.

ASSIGNMENT OF ERRORS PARTICULARLY RELIED ON BY APPELLANTS.

(1) The court erred in failing to hold that the Interstate Commerce Commission, under paragraphs (1), (3) and (4) of Section 3 of the Act to Regulate Commerce, had the jurisdiction contended for herein.

(2) The court erred in failing to hold that the said Commission, in its report of November 10, 1925, made in its Docket 15682, denied that it had the jurisdiction contended for herein under said paragraphs (1), (3) and (4) of said Section 3 of the Act to Regulate Commerce.

(3) The court erred in failing to hold that relators were entitled to the writ of mandamus prayed for herein and in refusing to issue said writ.

(4) The court erred in holding that relators were not entitled to the writ of mandamus prayed for herein; in overruling the demurrer filed by relators to the answers of respondent and interveners, and in dismissing the petition of relators.

ARGUMENT.

I.

THE COURT BELOW ERRED IN FAILING TO HOLD THAT THE INTERSTATE COMMERCE COMMISSION HAD THE JURISDICTION ALLEGED BY APPELLANTS; IN FAILING TO HOLD THAT SAID COMMISSION HAD ERRONEOUSLY DENIED THAT JURISDICTION; AND IN HOLDING THAT APPELLANTS WERE NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING SAID COMMISSION TO DETERMINE THE MERITS OF THE ISSUES PRESENTED TO IT BY APPELLANTS.

The foregoing states the real issues presented to this court for determination. The lower court wrote no opinion in overruling appellants' demurrer to the answers and in dismissing their petition. In assigning error, therefore, it was necessary for appellants to deal with the case as a whole. In a case of this sort, the propriety of an order granting a writ depends upon relatively few questions. They are: (1) Was jurisdiction denied; (2) Did the jurisdiction claimed actually exist and (3) Is mandamus the proper remedy. In our argument we shall deal with these matters in order:

A. IN ITS REPORT OF NOVEMBER 10, 1925, THE INTERSTATE COMMERCE COMMISSION DENIED ITS JURISDICTION TO DEAL WITH AND DETERMINE THE ISSUES PRESENTED BY APPELLANTS' INTERVENING PETITIONS FILED WITH IT, AND THE LOWER COURT ERRED IN FAILING TO SO HOLD.

As we have said, the printed report of the Commission in the proceeding before it is reproduced at pages 94, *et seq.*, of the printed record and contains a complete statement of the facts with respect to the Terminal Com-

pany, the relations between that company and its proprietary companies, and the proceedings before the Commission. Reference is made to the filing of intervening petitions by appellants and the relief requested therein, and it is also said (Rec., 98) that respondent (meaning the Terminal Company) filed a motion to strike the intervening petitions of appellants and certain other roads, the grounds for this motion being set out.

It will be observed that the two grounds of the motion (Rec., 98) were, first, that the petitions unduly broadened the issues raised by the petition of the Missouri-Kansas-Texas Railroad and the answer filed by the Terminal; and, second, that the Commission had no power or jurisdiction to grant the relief prayed for. So far as the claimed broadening of the issues is concerned, it may be disregarded. Nothing was said by the Commission in its report of November 10, 1925 with respect to this ground for dismissing appellants' intervening petitions. On the contrary, the only point dealt with was the claim of its lack of jurisdiction. That the Commission did dismiss these intervening petitions because of lack of jurisdiction is obvious from the language used in the report.

Referring to the relief requested by the small users, including appellants, the Commission said (Rec., 113):

“Controverting respondents challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement.”

And referring to the contrary argument, the Commission said (Rec., 114):

“The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to

private contracts, of concern only to the parties thereto."

Stating the issue before it and on which it then proceeded to pass, the Commission said (Rec., 114):

"Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After considering and discussing its power under paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said (Rec., 115):

"The power and authority thus invoked are not conferred by the quoted paragraph."

Further, after a discussion of Section 15a of the same act and its power thereunder, the Commission said (Rec., 116):

"However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

The report then discusses paragraphs (1) and (3) of Section 3 of the same act. With respect to these paragraphs it is said (Rec., 116):

"Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Following the statements of its conclusions with respect to its power to grant the relief prayed for in the intervening petitions filed by appellants, the Commission concluded by saying (Rec., 117):

“An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee and Alton.”

From all the foregoing, it can only be concluded that the order dismissing appellants' intervening petitions was entered because of the Commission's conclusion that it lacked jurisdiction to grant the relief requested by appellants. The language used in the report, and which we have quoted, is definite to that effect. The issue raised by the motion to dismiss was stated as one of jurisdiction; the question which the Commission then decided was said to be one of its jurisdiction; and the conclusion was reached after a consideration of its jurisdiction only. The words used were as definite as they could be, for after discussing its power under Section 15a of the Act, the Commission not only held that that section did not confer the claimed jurisdiction, but concluded by saying that,—

“we are unable to find the requested power or authority in any other provision of the act.”

Another consideration confirms our position on the matter. In dealing with the contentions of appellants and other small users of the Terminal, the Commission at no place in its report discussed the merits of the controversy as a basis for the conclusion reached by it. On the contrary, after stating the results which would be reached by the distribution of the charges of the Terminal under various differing methods, the Commission discarded the facts as a basis for the decision made by it, saying (Rec., 108):

“No particular purpose would be served by con-

sidering them in turn, as the conclusions reached make it unnecessary to determine which, if any, embodies an accurate or acceptable formula for division of the charges in question upon a user basis."

That the Commission did deny its jurisdiction to grant the relief requested in appellants' intervening petitions before the Commission is conceded in the answers filed by all interveners in this mandamus case. Only in the answer of the Commission is there any statement that this is not so. In that document (Rec., 206), it is alleged that the Commission did consider and determine upon the merits the asserted violation of paragraphs (1) and (3) of Section 3 of the act, and found that no such violation had been shown or established. This allegation of the answer must be based upon the language of the report discussing paragraph (1) of Section 3 of the act (Rec., 116) and to which we have heretofore referred.

Certainly, the language used in the report cannot be given the effect contended for by the Commission. This is so obvious from the words used that it is difficult to find argument additional to the statement that it is not so. The very language used negatives the position taken by the Commission. The Commission said (Rec., 116):

"Assuming, *without now deciding*, that the provisions of paragraph (1) are broad enough to embrace, etc."

These words are a statement by the Commission that it did not decide that it had jurisdiction. And as we have pointed out, in the paragraph immediately preceding, there is a definite statement that the Commission could not find the requisite power in any section of the act. The Commission's position in the case at bar seems to be that it denied jurisdiction, but that if it had jurisdiction, it correctly decided on the merits the questions

presented by appellants' intervening petitions. Such a claim is at least unusual, in that it contradicts itself.

We submit there can be no doubt that the Commission, in dealing with the intervening petitions filed with it by appellants, did expressly find that it did not have jurisdiction to grant the relief requested in those petitions.

B. THE COMMISSION HAD POWER AND JURISDICTION TO CONSIDER AND DECIDE UPON THE MERITS THE ISSUES PRESENTED BY THE INTERVENING PETITIONS OF APPELLANTS FILED WITH IT, AND THE LOWER COURT ERRED IN FAILING TO SO HOLD.

The petition filed with the Commission by the Missouri-Kansas-Texas Railroad Company, requested, so far as payments were concerned, that it be permitted to use the facilities of the Terminal Company, upon payment therefor upon the user basis. (Rec., 95.) Appellants and some of the other interveners sought the same relief (Rec., 98) through their intervening petitions (Rec., 85, 87), alleging that the numerical division of the interest and taxes of the Terminal Company, as required by the operating agreement, was prejudicial and discriminatory in violation of the Interstate Commerce Act.

The granting of this relief to appellants would have required the entry of an order by the Commission fixing a basis for the payment of such compensation different from the basis prescribed by the operating agreement, and this, the Commission held, it had no authority to do. Appellants contend that the Commission does have jurisdiction to make such an order upon a proper showing. Several matters are pertinent to a consideration of the Commission's power in the premises, and in order that this Court may have a clear understanding of the position taken by appellants with respect to the subject, we shall deal with these matters in order.

1. *The existence of a contract to which appellants were parties and which prescribed the compensation to be paid by each party for its use of the facilities of the Terminal Company did not deprive the Commission of jurisdiction to pass upon prejudice and discrimination resulting from the application of the contract.*

It has been consistently argued throughout this litigation that the existence of the operating agreement between the twelve railroads which own all the stock of the Terminal Company deprived the Commission of jurisdiction to enter any order of the sort requested by appellants. The contention made before the Commission, as stated by that body (Rec., 113, 114), was that, the contract being valid, the Commission had no authority to enter an order which would operate as a revision of it. On this point the Commission indicated that the existence of the contract would not have deprived it of jurisdiction, if that jurisdiction had been vested in it by the Interstate Commerce Act, saying (Rec., 114):

“The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that the franchise grants are among the mutual covenants make it immune
* * *

Certainly, no principle of law is better settled than that the existence of a contract does not make the subject matter of the contract immune from federal regulation. In *L. & N. R. Co. v. Mottley*, 219 U. S. 467, the issuance of a pass in consideration of the release of a claim for damages was held to be unlawful under provisions of the subsequently enacted Act to Regulate Commerce, the court holding that the agreement under

which the pass was issued must have been made subject to the possibility of such regulation by Congress as would make the agreement unenforcible or impair its value.

To the same effect are *Calhoun v. Massie*, 253 U. S. 170; *Interstate Commerce Commission v. A. T. & S. F. Ry. Co.* 234 U. S. 294; and *State of New York v. United States*, 247 U. S. 591. In the latter case a passenger rate of 2 cents a mile charged by the New York Central Railway Company was sought to be upheld on the ground that an increase required by the Commission invalidated a charter contract between the State of New York and the Railway Company, but this defense was overruled. Later cases to the same effect are *Stephenson v. Binford*, 287 U. S. 251; *Colorado v. United States*, 271 U. S. 153, 165; and *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.* 289 U. S. 266. In the latter case the rule is well stated by the court at page 282:

“This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co. v. United States*, 204 U. S. 364, 400, 401; *Philadelphia Company v. Stimson*, 223 U. S. 605, 634, 638; *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 613, 614; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 260; *Continental Insurance Co. v. United States*, 259 U. S. 156, 171; *Sproles v. Binford*, 286 U. S. 374, 390, 391; *Stephenson v. Binford*, 287 U. S. 251, 276; *City of New York v. Federal Radio Commission*, 36 F. (2d) 115; 281 U. S. 729; *American Bond & Mortgage Co. v. United States*, 52 F. (2d) 318; 285 U. S. 538; *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F. (2d) 850; 288 U. S.”

Under these decisions, it scarcely can be argued that if jurisdiction to prescribe the terms upon which the property of the Terminal Company may be used has been conferred upon the Commission by the Interstate Commerce Act and acts amendatory thereof, that jurisdiction is defeated by the physical existence of the operating agreement. Nor are appellants estopped by reason of their participation in that agreement. *Los Angeles Switching Case*, 234 U. S. 294, 312. The opinion of the Commission indicates the feeling that what appellants desired it to do was rewrite the contract. Thus, the Commission said (Rec., 116):

“Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; * * *”

Again, in stating the contentions of appellants and the other small users of the Terminal Company's facilities, the Commission said (Rec., 115):

“A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed.”

This view of the Commission is a mistaken one. We might concede a lack of power in the Commission to rewrite the operating agreement and compel subscription to the rewritten agreement by the railroads owning the terminal property. Our point is that the power conferred upon the Commission to prevent or cure prejudice and discrimination may not be confined or limited by the language of the operating agreement. The exact contention of appellants was well stated by Commissioner

Eastman in his dissenting opinion in which he said (Rec., 129) :

“The opinion of the majority conveys the thought that the intervening small users are trying to persuade us to revise or rewrite the contract for the use of the terminal facilities. I do not so understand their position. Their contention is that no contract can stand in the way of the exercise in the public interest of our powers under the act; and this doctrine is, indeed, admitted and amply supported by citations in the majority opinion. When we exercise such powers in conflict with the provisions of a contract, we do not undertake to revise or reform that contract. We merely direct that certain things be done. If they can be done under the contract, well and good. If they cannot be done under the contract, it must be disregarded. * * * Our power in this respect is wholly different from that of a court of equity which undertakes to reform a contract for the benefit of one of the parties to it. We do not seek to enforce the principles of equity but only to administer certain legislative provisions for the *protection of the public interest*, against which provisions a contract is no bar.”

We submit that it may not be doubted that the existence of the operating agreement, requiring certain payments by appellants as a condition of their use of the Terminal Company's facilities, is not a bar to an order by the Commission, made upon a proper record, and prescribing a different basis of payment as a condition of the same use.

2. *The Commission had jurisdiction to consider upon their merits the issues presented by appellants in their intervening petitions, and reach a decision with respect thereto.*

The matter of the Commission's jurisdiction in this case is dealt with rather fully in the dissenting opinion written by Commissioner Eastman (Rec., 123 *et seq.*)

It seems to us to be obvious from a consideration of the law itself and the decisions of the various courts in construing it. We first direct the court's attention to the fact that all amounts paid by each appellant to the Terminal Company, including payments for interest and taxes, represented the total cost to it of its use of the facilities of the Terminal Company. The Commission in its majority opinion apparently did not fully realize this fact, as it is said with reference to the interest and tax charges (Rec., 116):

“Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, * * *”

This is entirely wrong and, as pointed out by Commissioner Eastman in his dissent (Rec., 131):

“It confuses the status of the railway companies as stockholders of the Terminal Company with their status as users of its terminal facilities.”

As in the case of the terminal at St. Louis (*United States v. Terminal Railway Association*, 224 U. S. 383), the total amounts expended by every user of the Kansas City Terminal represent the total cost to each of them of the terminal facilities used by them. Taxes have frequently been held to be a part of such total cost. *Foster v. Goddard*, 66 U. S. 506. And in railroad cases, taxes have specifically been held to be operating expenses. *Duluth Street Railway Company v. Commission*, 4 Fed. (2d) 550; *Georgia Power Company v. Commission*, 262 U. S. 625; *Galveston Electric Company v. Galveston*, 258 U. S. 388.

In this case, the conclusion that all amounts paid by any user of the facilities of the Terminal Company constitute the total payment made for such use is strengthened by the fact that no company owning any stock in

the Terminal Company gets any benefit from such ownership, except its right to use the facilities of the terminal. The Terminal Company was not organized for profit and does not earn a profit. The sole purpose sought through its creation was the construction and/or acquisition of terminal facilities so that its proprietary companies having lines of railroad to Kansas City would have adequate terminal facilities at that point.

This situation is similar to that in *Chicago, etc. Ry. Co. v. Des Moines, etc. Company*, 254 Fed. 924; 254 U. S. 196. In that case also, several railroad companies had caused the incorporation of a railroad company to operate terminals in Des Moines, Iowa. On the point we are now discussing, Judge Hook dissented from the majority opinion in the Court of Appeals, saying at page 952, that since the railroad companies had organized the Terminal Company and invested it with the legal title to their property so that their public duties could be better and more conveniently performed, it determined the character of the terminal organization. He also pointed out, at page 955, that the stock was not intended as a source of profit apart from railroad use, the stock ownership and terminal use being inseparable. The Supreme Court adopted the view set forth in Judge Hook's dissenting opinion, saying at page 210:

"In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stock holdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the oper-

ations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal."

That all amounts paid by the users of the facilities of the Terminal Company are paid as compensation for that use is so obvious as to make argument difficult. The fact is that the railroad companies which formerly owned the terminal facilities at Kansas City might well have continued to operate those facilities themselves, as they formerly did, or under an operating agreement without the formation of a separate corporation. In either such event it could scarcely be denied that all expenditures made by each using company for the privilege of using all terminal facilities would have represented a cost to each such company arising out of such use. Or, on the other hand, the proprietary companies might have created the Terminal Company as a separate corporation but reimbursed it for all expenses through the medium of payments made under tariffs instead of under contract. In such case it could hardly be contended that that proportion of the tariff charges paid by the users and which was devoted by the Terminal Company to the payment of interest and taxes did not represent a cost of terminal facilities incurred by the using and paying lines.

With this situation in mind, we call attention to the language of paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce. Paragraph 1 of Section 3 (U. S. C. A., Title 49, p. 158) reads as follows:

"Undue preferences or prejudices prohibited. It

shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of Section 3 (U. S. C. A., Title 49, p. 195) reads as follows:

"Interchange of traffic. All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

These sections may be considered together. Their purpose has been dealt with in many decided cases and has been announced repeatedly in decisions of various courts. That purpose was to destroy favoritism, prohibit preferences and eliminate every form of discrimination and inequality. *N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467; *Central Railroad Company of New Jersey v. United States*, 257 U. S. 247; *Tap Line Cases*, 234 U. S. 1.

In the last case above cited the court said (p. 29) that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in

favoritism and unfair advantage to particular carriers and shippers." It will thus be observed that the prohibition of the act against discrimination, preferences and inequalities is equally operative in favor of carriers as of shippers.

And in other cases, the courts have been still more specific. Thus, in *Pennsylvania Company v. United States*, 236 U. S. 351, the attack by the Railroad Company was upon an order of the Commission requiring it to remove a discrimination in connection with the operation of terminal property owned by it at New Castle, Pennsylvania, the discrimination in question having been found by the Commission to exist in favor of other carriers at that point. The facts were that the Pennsylvania Company was performing service upon its terminals at New Castle for certain carriers but declined to do so for the Buffalo, Rochester & Pittsburgh Railway Company, the complainant before the Commission. The order of the Commission required the removal of the discrimination. Quoting paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act as they then stood, the court upheld the jurisdiction of the Commission and the order made by it, saying at page 361:

"This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 219; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 170."

In accordance with this construction of the law, the court upheld the Commission's conclusion that there had been a discrimination against the Buffalo, Rochester & Pittsburgh Railway Company. In the case cited, the principle attack upon the order of the Commission was based

upon the argument that the order required the Pennsylvania Company to give up the use of its terminals to another company, Section 3 of the act then prohibiting such a requirement. The section has since been amended so that this prohibition is no longer in the act, paragraph (4) of Section 3 conferring upon the Commission specific power to require the giving of such use.

In the case of *Louisville & Nashville R. Co. v. United States*, 238 U. S. 1, a similar order by the Commission finding discrimination as between common carriers in the use of terminals and requiring its removal was again upheld, the court saying at page 20:

“In this case the controlling feature of the Commission’s order is the prohibition against discrimination.”

In *Baltimore & Ohio Railroad Company v. United States*, 264 U. S. 258, the action was by twelve eastern railroads to set aside an order of the Commission permitting the New York Central to acquire control of terminal facilities operated by the Chicago River & Indiana Railroad Company and the Chicago Junction Railroad Company in Chicago. In sustaining the right of the plaintiffs to maintain the action and in dealing with possible loss which might be inflicted upon them as a result of the acquisition, the court said at page 267:

“It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States*, 236 U. S. 351.”

In *Chicago, Indianapolis & Louisville Railway Company v. United States*, 270 U. S. 287, the action was to set aside an order of the Commission finding discrimination against the Chicago, Lake Shore & South Bend Railway Company, in connection with terminal service

furnished at South Bend, Indiana. In that case no argument was made that the Commission did not have power to order the discrimination and preference removed if they were found to exist in fact. Having found that the evidence justified the order, the court sustained it.

In *Colorado v. United States*, 271 U. S. 153, the action was by the State of Colorado to set aside an order of the Commission authorizing the discontinuance of operation upon a line of railroad wholly within the State of Colorado. The order was based upon a finding by the Commission of discrimination against and prejudice of interstate commerce. In affirming the order the court said at page 163:

“Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.”

We call attention to the foregoing quotation, for the prejudice there stated by the court as being possible is precisely the sort of prejudice and discrimination which appellants claim exists at Kansas City. Whether or not it does exist is, of course, a matter to be determined by the Commission, but certainly, appellants are entitled to a hearing before that body in order to determine the fact.

We also call attention to the recent decision of the Supreme Court in *Transit Commission v. United States*, 289 U. S. 121. In that case the Commission had made an order with respect to the continued use by the Long Island Railroad of the tracks and other terminal facilities of the Pennsylvania Tunnel & Terminal Railroad Company. The appellants maintained that the subject matter of the order was not within the jurisdiction of the Commission but was reserved to the state authorities. As stated by the court at pages 125 and 126 of its opinion, the Commission had held "that the reasonableness of a joint facility rental is a matter of public interest as well as one affecting the operations of the carriers." Speaking of paragraph (18) of Section 1 of the act, the court said at page 128:

"So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. *Railroad Commission v. Chicago, B. & Q. R. Co.* 257 U. S. 563, 585, 589, 590; *New England Divisions Case (Akron, C. & Y. R. Co. v. United States)*, 261 U. S. 184, 189; *Railroad Commission v. Southern P. Co.* 264 U. S. 331, 343; *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.* 270 U. S. 266, 277; *Colorado v. United States*, 271 U. S. 153, 163; *Alabama & V. R. Co. v. Jackson & E. R. Co.* 271 U. S. 244, 249."

From the foregoing, the jurisdiction of the Commission to pass upon the issues presented by appellants in their intervening petitions seems quite plain. Appel-

lants asked the Commission to exercise no more jurisdiction than it had exercised in the *Pennsylvania Company Case*, 236 U. S. 351, and the *Louisville & Nashville Railroad Company Case*, 238 U. S. 1. True, those cases involved questions of service, but it needs no argument to demonstrate that there may be a discrimination and prejudice with respect to charges as well as with respect to service. If there is such prejudice and discrimination with respect to charges made for the use of the facilities of the Terminal Company, the Commission certainly has as much jurisdiction to correct the situation as it would have to correct a discrimination resulting from a refusal of the Terminal Company to afford service at all to appellants.

In the *Transit Commission Case*, 289 U. S. 121, the entire dispute was with respect to the amounts to be paid for the use of terminal facilities. In *Cincinnati, etc. Ry. Co. v. Indianapolis Union Ry. Co.* 36 Fed. (2d) 323, the action was to rescind an election to adopt a contract for the use of the terminal facilities of the defendant company. In sustaining the action, the court said at page 325:

“The proof is undisputed that the continuance of the entire present burden will be ruinous, and will compel a receivership and a foreclosure of the existing mortgages. It is now against the established public policy to permit a railroad to assume burdens which it cannot carry and which must cause at least interruptions and embarrassment to its public duties. * * * It is even within the bounds of possibility that the Commission might prohibit its further performance of the obligation upon its existing terms. See *L. & N. Ry. v. Mottley*, 219 U. S. 467; *Cleveland Passenger Terminal Case*, 70 I. C. C. 659.”

In *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225, the action was for a writ of

mandamus to compel the defendant to permit the use of its terminals by the Atlantic, Valdosta & Western Railway Company, in accordance with an order of the Florida Railroad Commission. The court said in granting the writ (p. 236):

“Where the public interest and convenience require that the Atlantic, Valdosta & Western Railway should be admitted to the uses and privileges of the passenger terminal of defendant in error, it is an abuse, and an unjust discrimination against the public and the passengers of that road, as well as against the road itself, not to accord that use and those facilities; and an excessive charge against that road for terminal facilities is in effect an excessive charge which the public will have to pay, in the increased rate of fare caused by such excessive charge.”

Even if the language of paragraphs (1) and (3) of Section 3 were not as definite as they are, it is still clear that the Commission would have the jurisdiction for which we contend. In the *Pennsylvania Company Case*, 236 U. S. 351, the court pointed out (p. 362) that Section 3 of the Interstate Commerce Act had not been amended although there had been many amendments to the act. After discussing those amendments, it said at page 363:

“It follows that the provisions of Sec. 3 of the act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the act covers the entire carriage and services in connection with the receipt and delivery of property transported.”

As this Court knows, the Interstate Commerce Act has been substantially amended since its original enactment, notably by the Transportation Act, 1920. Subsequent to the 1920 amendments, the Supreme Court had occasion to consider the entire act, as thus amended, in many cases. Cases of this character are *Railroad Commission of Wisconsin, et al. v.*

C. B. & Q. R. Co. 257 U. S. 563; *A. C. & Y. Ry. Co., et al. v. United States*, 261 U. S. 184; *Dayton-Goose Creek Railway Company v. United States*, 263 U. S. 456; *Railroad Commission of California v. Southern Pacific Co., et al.* 264 U. S. 331; and *Colorado v. United States*, 271 U. S. 153. Thus, in the *Wisconsin Case*, 257 U. S. 563, the court said (p. 585) that the amendments added to the act in 1920 made a new departure in that, as amended, it required the Commission to take the necessary steps to maintain an adequate railway service for the people of the United States. In the *Akron, Canton & Youngstown Railway Company Case*, 261 U. S. 184, it was said (p. 189) that the 1920 amendments introduced into federal legislation a new railroad policy; that it sought to insure adequate transportation service, and that this purpose was expressed in unequivocal language. In the *Dayton-Goose Creek Railway Company Case*, 263 U. S. 456, the court said at page 478:

“The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic in the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. * * * To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.”

In the *Railroad Commission of California Case*, 264 U. S. 331, the court, at page 343, referred specifically to amended paragraph (3) of Section 3 of the act, and after referring to other provisions, stated that it was obvious that Congress intended to place under the superintending and fostering direction of the Commission all increased facilities in the matter of car distribution, joint terminals and interchange of traffic. That case was one involving the construction of the proposed new union station at Los Angeles, which would have required a large expenditure of money by the railroads. Sustaining the power of the Commission to pass upon such a project the court said at page 347:

“The purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions, is further shown in Section 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Section 20a.”

As a matter of fact, under later decisions it has been held that the power of the Commission over the general operations of carriers is so broad that it may exist and be exercised even in the absence of a specific provision of the act authorizing such action. Thus, in *Alabama & Vicksburg Railway Company v. Jackson & Eastern Railway Company*, 271 U. S. 244, there was involved the jurisdiction of the Commission over the proposed construction of a connecting track between the railroads parties to the litigation. In sustaining the jurisdiction of the Commission, the court said at page 248:

“Prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confer upon the Com-

mission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question."

And in the late case of *Transit Commission v. United States*, 289 U. S. 121, involving the jurisdiction of the Commission over the terms and conditions of a trackage agreement, the court sustained the jurisdiction of the Commission. It was claimed by the railroads that jurisdiction was conferred upon the Commission by paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act. This was denied by the Transit Commission. The court upheld the jurisdiction of the Commission, saying at page 127:

"These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement under consideration."

In connection with the case cited, it should be noted that the order of the Commission had fixed the compensation which the Long Island Railroad was to pay for its use of the tracks and facilities of the other carrier involved. This is precisely what appellants asked the Commission to do at Kansas City in connection with their use of the facilities of the Terminal Company. If it be conceded, as it must, that the existence of the operating agreement at Kansas City does not deprive the Commission of the jurisdiction claimed for it, we do not understand why it should have less jurisdiction with respect to operation at that point than it had and exercised in New York.

The jurisdiction of the Commission here sought to be established also appears to be definitely granted by the

language of paragraph (4) of Section 3 of the Interstate Commerce Act (U. S. C. A. Title 49, p. 201). That paragraph, in so far as it is pertinent, reads as follows:

“If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings.”

This paragraph was added to the Interstate Commerce Act by the Transportation Act, 1920. Dealing with its jurisdiction thereunder, the Commission said (Rec., 114, 115):

“The primary power to be exercised is to ‘require the use’ of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then ‘owning or entitled to the enjoyment’ of the facilities and for the benefit of ‘another carrier’ or ‘other carriers’; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

Obviously, the interveners are not in the latter situation.”

Applying this theory, the Commission then held that because appellants had a right to use the facilities of the Terminal Company provided they made the payments required by the operating agreement, it could do nothing in the way of affording them any relief, even

though the facts might justify it. We submit that this was error.

Under paragraph (4) of Section 3 the Commission is given two powers: (1) to compel a carrier owning terminal facilities to permit another carrier to use those facilities; (2) to fix the terms for such use. The courts have held that the powers of the Commission are to be broadly construed to enable carriers to operate efficiently and economically. In such circumstances it is not reasonable to assume that the power to compel the use of terminal facilities and the power to fix the compensation to be paid therefor are to be narrowly construed, or that the Commission can act only in cases where it must exercise both powers. To so construe the law largely limits its application and the power of the Commission thereunder, which would be distinctly not in harmony with the purposes sought to be accomplished by its enactment as those purposes are announced in the cases we have cited.

Thus, the granting of a right to use by the Commission under this section of the act would be worthless if a carrier owning terminals had the right to charge such a high rental for the use of its facilities as to prohibit the use. Conversely, the fixing by the Commission of reasonable compensation would be useless unless it also granted a right to use. Thus, it is obvious that the granting of a right to use and the fixing of reasonable compensation for such use are of equal importance.

The law itself makes no distinction between the two functions and does not confine the right to fix compensation to those cases in which a right to use is also granted. In the case at bar, for example, the right to use granted appellants by the operating agreement is of little value because of the excessive compensation

which they are required to pay therefor, and which, if given an opportunity, they can demonstrate produces a discrimination and prejudice against and burden upon their interstate commerce in violation of the law.

And the Commission's jurisdiction under this paragraph is clear, even on its own theory. If, upon a consideration of the facts, it should hold that the user basis of dividing all expenses of the Terminal Company was proper, its order would necessarily require and grant the use of the Terminal Company's facilities by the using lines upon the making of payments on the basis approved by it. Thus the order would not only fix compensation for use, but also grant the right to use, subject to the payment of such compensation.

In other cases the Commission itself has adopted the theory for which we here contend. Thus, in *C. & A. R. Co. v. T. P. & W. R. Co.* 146 I. C. C. 171, the Commission recognized the right of a railroad to come to it under paragraph (4) of Section 3 for the ascertainment and fixation of compensation to be paid for the use of terminal facilities, even though the right to use was conceded and offered by the carrier owning the facilities. In that case the right to use was offered upon the payment of a rental of \$50,000 a year, just as in this case the right to use the facilities of the Terminal Company is granted to appellants upon their agreement to each pay one-twelfth of the interest and taxes of the Terminal Company, together with other charges. In the case cited the complaining road felt that the compensation required to be paid for the use offered was excessive, just as appellants feel that the compensation required at Kansas City under the operating agreement is excessive. And in the case cited the Commission upheld its jurisdiction, even though the only

real issue between the parties involved was as to the amount to be paid for the use. The amount to be paid for the use of terminal facilities was also the only real issue in the *Transit Commission Case*, 289 U. S. 121.

3. In concluding this portion of our brief we desire to call attention to one fact. In its decision (Rec. 112) the Commission referred to the argument made in the hearings before it that the operating agreement has been assigned as part of the security for the first mortgage bonds of the Terminal Company and that the security of those bonds would be jeopardized or destroyed if there were any readjustment of the compensation to be paid by the owning lines to the Terminal Company under the operating agreement. We cannot say how much weight this argument had in influencing the Commission's decision, but we wish to make it plain to this Court that there would be no such result even if after hearing the Commission prescribed such a readjustment of charges as appellants have asked.

As appears from the statement of fact in the Commission's report, every proprietary line of the Terminal Company has a joint and several obligation with respect to the principal and interest of the bonds issued by that company. Obviously, it can make no difference to the holder of a bond in what proportions the principal and interest is to be paid by the various companies; that is to say, the holder would not care what proportion of the amount due him was paid by appellants or either of them, so long as he received from the Terminal Company the total amount to which he was entitled. There has never been any contention by appellants that any order should be made which would in any way affect the right of the holder of any of these securities to receive full payment.

It is plain that a different basis of contribution by the twelve owning lines of the Terminal Company to the total amount required for the payment of principal and interest on those bonds would have no such effect. It would be quite ridiculous to assume that if the Atchison, Topeka & Santa Fe Railway Company were to pay 25 per cent of the amounts due on the interest and principal of those bonds instead of $8\frac{1}{2}$ per cent, it would affect the standing of the bonds. The operating agreement requires the using lines to pay the obligations of the Terminal Company and appellants have sought no change in that requirement. All that was asked was that the basis of contribution by the using companies, however many there might be, should reflect the use made by each using company of the facilities of the Terminal Company.

C. SINCE IT HAD POWER TO DO SO, IT WAS THE DUTY OF THE INTERSTATE COMMERCE COMMISSION TO INVESTIGATE AND DETERMINE THE MERITS OF THE ISSUES PRESENTED BY APPELLANTS' INTERVENING PETITIONS, AND HAVING DECLINED TO DO SO, MANDAMUS IS THE PROPER REMEDY TO ENFORCE APPELLANTS' RIGHTS. THE LOWER COURT ERRED IN FAILING TO SO HOLD.

As we have pointed out, it is quite plain from the language of the Commission's report of November 10, 1925, that its action in dismissing appellants' intervening petitions was due to its conclusion that it had no jurisdiction to pass upon the issues presented by those petitions and grant the relief requested. Since it had that jurisdiction, its duty in the premises was clear. Appellants and appellees are all common carriers subject to the Interstate Commerce Act. Paragraphs (1) and (3) of Section 3 of that act (U. S. C. A., Title 49, pp. 158, 195) are specific in declaring unlawful the preference, advan-

tage and discrimination referred to therein, and in prohibiting the same.

Paragraph (4) of Section 3 (U. S. C. A., Title 49, p. 201) is definite in conferring upon the Commission power to fix the terms and conditions under which one carrier may use the terminal facilities of other carriers. Paragraph (1) of Section 12 (U. S. C. A., Title 49, p. 368) provides that the Commission is authorized and required to execute and enforce the provisions of the Act. Paragraph (1) of Section 13 (U. S. C. A., Title 49, p. 377) authorizes the filing with the Commission by any common carrier of a petition complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention of the provisions thereof and concludes as follows:

“If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.”

And in conclusion, paragraph (1) of Section 14 (U. S. C. A., Title 49, p. 394) imposes upon the Commission the duty, after investigation, of making a report in writing with respect thereto, which report shall state its conclusions and its decision in the premises.

In view of the foregoing, it may not be denied that the duty of the Commission in this case was mandatory. It had no alternative other than to receive the intervening petitions of appellants, investigate and consider the matters therein set out, and decide such matters upon the merits as developed by the evidence. Instead of doing this, the Commission dismissed the petitions upon a finding that it did not have jurisdiction to deal with them as the law would otherwise have required it to deal.

Under these circumstances mandamus is unquestionably the proper remedy, and indeed, it is the only remedy available to appellants. That this is so is now definitely settled by the decisions of the Supreme Court in *Interstate Commerce Commission v. Humboldt Steamship Company*, 224 U. S. 474, 484, 485; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 643; *Kansas City Southern Railway v. Interstate Commerce Commission*, 252 U. S. 178, 187; *Interstate Commerce Commission v. Los Angeles*, 280 U. S. 52. The same rule has been applied in this court: *Blair v. United States, ex rel. Union Pacific R. Co.*, 6 Fed. (2d) 484, 486; *United States v. Board of Tax Appeals*, 16 Fed. (2d) 337, 339; *United States v. Interstate Commerce Commission*, 34 Fed. (2d) 228; *N. Y. N. H. & H. R. Co. v. Interstate Commerce Commission*, 55 Fed. (2d) 1028, 1036, 1037.

The rule is well stated in the *Louisville Cement Company Case, supra*, in which the court said at pages 642 and 643:

“That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission v. Humboldt Steamship Co.* 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russell*, 13 Wall. 644; *Ex parte Schollenberger*, 96 U. S. 369; *Hollon Parker, Petitioner*, 131 U. S. 221; *In re Grossmayer*, 177 U. S. 48, and *Interstate Commerce Commission v. Humboldt Steamship Co.* 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error.”

We are aware of those cases in which it has been held that mandamus cannot be had to require a particular ex-

ercise of judgment or discretion, jurisdiction having been assumed and a decision on the merits having been made. *Interstate Commerce Commission v. United States*, 289 U. S. 385; *Work v. Rives*, 267 U. S. 175; *United States v. Interstate Commerce Commission*, 8 Fed. (2d) 901, 902; *United States v. Interstate Commerce Commission*, 11 Fed. (2d) 554, 556; *Bartlesville Zinc Co. v. Interstate Commerce Commission*, 30 Fed. (2d) 479, 480; *United States v. Mellon*, 41 Fed. (2d) 119, 120; *Southern Transportation Company v. Commission*, 47 Fed. (2d) 411, 413; *United States v. Interstate Commerce Commission*, 51 Fed. (2d) 429, 431; *Southern Transportation Co. v. Interstate Commerce Commission*, 61 Fed. (2d) 925.

In this case, however, appellants do not ask the court to direct the Commission to decide the issues presented to it in any particular way. All they request is that an order be made requiring the Commission to consider those issues on their merits and decide them in some way. Having decided the issues one way or the other, appellants will then give consideration to such further action as may be necessary by them, depending upon the decision made by the Commission. Nor, as we have said, has there been any decision by the Commission on the merits of the controversy.

Even in the cases last cited, however, the courts have uniformly held that mandamus will issue to compel a performance of duty. Thus, in *Interstate Commerce Commission v. United States*, 289 U. S. 385, the court said at page 394:

“If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty * * *. Mandamus is an appropriate remedy to compel a judicial officer to act.”

And this case is well within the rule of *United States v. Wilbur*, 283 U. S. 414. In that case judgment went for the defendant because the sections of the statute there involved conferred upon the defendant discretion to act or not to act upon the applications presented. Other sections of the same law imposed requirements upon the defendant with respect to applications filed by persons who had made expenditures, and with respect to this point, the court said (page 419):

“The provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and a permission to take certain action in his discretion.”

The case at bar is entirely different, for the Commission rested under a positive mandate to receive appellants' petitions, investigate the issues presented in them and make its decision on the merits of the controversy.

Nor is this case affected by the decision in *Wilbur v. United States*, 281 U. S. 206. In that case the writ was denied because granting it would have operated as a reversal of a decision made by the Secretary of the Interior in the exercise of a discretion conferred upon him by statute. Speaking of mandamus the court said at page 218:

“It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in any particular way nor to direct the retraction or reversal of action already taken in the exercise of either.”

Under the rule as thus stated, the writ prayed for was denied. The case at bar would be affected by that decision only if the Commission had decided the matter before it in the exercise of the discretion conferred upon it by statute and if appellants were asking for a writ requiring it to make some other decision.

In the answers of the intervening appellees it is alleged that the order of the Commission dismissing appellants' intervening petitions was negative and is not subject to review by the courts in any proceeding (Rec., 226, 236), and the case of *Interstate Commerce Commission v. United States*, 289 U. S. 385, is cited in support of the statement. Such a negative order, however must be one denying relief in the exercise of the Commission's discretion after full hearing and upon a determination of the merits. The rule is plainly not applicable in a case such as the one at bar, where the dismissal order resulted from a finding of lack of jurisdiction and not from a finding by the Commission, in the exercise of its jurisdiction, that under all the facts and circumstances the relief requested should not be granted. In other words, a negative order must in any event be a result of the Commission's exercise of jurisdiction and discretion. A denial of jurisdiction and the consequent dismissal of a petition does not make an order negative.

If the theory of appellees is correct, the decision of the Supreme Court in the *Louisville Cement Company Case*, *supra*, should have denied the writ there prayed for, since the decision of the Commission had denied the relief requested. In this case also, the relief requested by appellants was denied, but, as in the *Louisville Cement Company Case*, *supra*, the denial was based upon a holding that the Commission had no power to grant the relief, not upon a finding of jurisdiction and a consequent administrative decision that the relief should not be granted upon the merits.

Since the order complained of was based upon an assumed lack of jurisdiction; since the Commission actually had the jurisdiction which it denied; since the duty

imposed upon the Commission was mandatory; and since appellants' request was only for an order requiring the exercise of the jurisdiction which the Commission had, there being no prayer that the writ control the exercise of the Commission's discretion, we submit that mandamus is the proper remedy and that this action was properly brought in the Supreme Court of the District of Columbia.

CONCLUSION.

From all the foregoing we submit that appellants should prevail in this case and that the writ of mandamus prayed for should issue. Any holding that the Commission assumed jurisdiction of the issues presented by appellants' intervening petitions must ignore the language of the report made on November 10, 1925. Any holding that the Commission actually does not have the jurisdiction contended for must contradict those decisions of the Supreme Court to which we have referred and impose upon the Commission limitations in power which were obviously not intended. The jurisdiction here contended for is far less than that which the Commission has been held to have in many cases decided by the Supreme Court, and is a jurisdiction which it has exercised in other cases. It is inconceivable in view of its broad powers to prevent prejudice and discrimination and its almost autocratic powers with respect to the use of railway terminal facilities and the payment of compensation therefor, that the Commission should not have jurisdiction to deal with the issues presented to it by appellants.

The character of that discrimination fully appears in the record herein. In the report of November 10, 1925 (R. 109) there appears a table showing the money dif-

ference to the using lines of the Terminal Company during the period March 1, 1920 to December 31, 1923, had all expenses of that company been distributed on the user basis instead of partly on the user basis and partly on the numerical basis. The statement shows that in this period of 3 years and 10 months the Chicago Great Western was compelled to pay under the operating agreement \$540,258.32 more, and the Kansas City Southern \$495,908.06 more than they would have paid had the interest charges and taxes of the Terminal Company been distributed on a user basis. These figures demonstrate that during the period in question each appellant was expending well in excess of \$100,000 a year for which it received nothing.

And this is a continuing condition. Exhibit 2 attached to the petition (R. 84) shows that in 1932 the difference in the two bases of payment increased the charges of the Chicago Great Western \$130,779.39 and the charges of the Kansas City Southern \$139,269.32. Since nothing was received for the expenditure of these amounts and they operated to increase the profit of other lines, it is difficult to understand how the requirement that they be paid is not a discrimination under the cases cited. This is particularly so when consideration is given to the savings made by the larger users of the Terminal Company's facilities. Thus, for example, in 1932 the Atchison, Topeka & Santa Fe saved \$404,351.76 because the interest charges and taxes of the Terminal Company were distributed on the numerical basis instead of the user basis.

The situation, as it affects appellants, may be illustrated by the figures relating to the Kansas City Southern. In 1932, that road paid \$40,134.64 on account of the Terminal Company's operating and maintenance expenses, and of this amount \$33,661.06, or 83.87 per cent,

was for passenger train service. The Kansas City Southern had passenger earnings in 1920 of \$2,225,909.22 which in 1932 had decreased to \$310,377.18. In 1920 it had passenger train earnings of \$4,058,503.93, which in 1932 had decreased to \$668,269.25. It operates but one passenger train a day in and out of the Union Station at Kansas City. For operating this train over the facilities of the terminal in 1932 it paid \$231,898.10, which was 74.7 per cent of its gross revenue from passenger service and 34.7 per cent of its total passenger train earnings in that year.

This court should also know that the action of appellants in joining with the other ten trunk lines at Kansas City in the use of the facilities of the Terminal Company was not entirely voluntary. As appears from the report of the Commission (R. 99), when the terminal was first organized, the Kansas City Southern occupied its own station and the Chicago Great Western was its tenant. The union station used by other lines was inadequate and active public sentiment demanded the establishment of new and better facilities. Even in the face of this demand, appellants were not parties to the original operating agreement. They only came into the terminal arrangement at a later date when the action of all other lines forced them, for competitive reasons, to join also.

The seriousness of the situation is illustrated by the fact that at this time no less than four of the proprietary lines, the Chicago, Rock Island & Pacific, St. Louis-San Francisco, Wabash and Missouri Pacific are insolvent, either being operated by receivers or having filed petitions under Section 77 of the Bankruptcy Act. In addition, the Alton, Milwaukee and Missouri-Kansas-Texas have only recently emerged from receivership. Under

such conditions, it is plain that a distribution of charges at Kansas City which imposes such burdens upon the smaller users of the terminal facilities at that point is prejudicial to their interests and discriminatory in favor of larger users; also that the excess payments which the smaller users are now required to make constitute a burden upon their interstate commerce within the condemnation of the rule established by the Supreme Court.

We submit that the judgment of the lower court should be reversed and this case remanded with directions to that court to issue the writ prayed for.

Respectfully submitted,

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COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

FEB 12 1934

IN THE COURT OF APPEALS OF
THE DISTRICT OF COLUMBIA

CLERK

APRIL TERM, 1933.

No. 6068.

SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA EX REL.
CHICAGO GREAT WESTERN RAILROAD COM-
PANY AND THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, APPELLANTS,

VS.

INTERSTATE COMMERCE COMMISSION, THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY ET AL.,
APPELLEES.

BRIEF ON BEHALF OF APPELLEE, KANSAS
CITY TERMINAL RAILWAY COMPANY.

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THE DISTRICT OF COLUMBIA**

APRIL TERM, 1933.

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SPECIAL CALENDAR.

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APPELLEES.

**BRIEF ON BEHALF OF APPELLEE, KANSAS
CITY TERMINAL RAILWAY COMPANY.**

STATEMENT.

The judgment appealed from is a judgment of the Supreme Court of the District of Columbia, denying the appellants a writ of mandamus to require the Interstate Commerce Commission to vacate its order of dismissal and to take jurisdiction of and decide upon

the merits the issues claimed to be raised by certain intervening petitions filed by the appellants before the Interstate Commerce Commission in a proceeding before the Commission instituted by Missouri-Kansas-Texas Railroad Company (hereafter called "M-K-T") against Kansas City Terminal Railway Company (hereinafter called "Terminal Company").

The M-K-T, a new company which had purchased the railroad of the old Missouri, Kansas and Texas Railway Company at foreclosure sale, had disaffirmed the contract (called the Operating Agreement, R. p. 16), by which the old company had the right to use the Terminal Company's facilities (R. p. 95).

By its complaint the M-K-T sought an order of the Commission requiring the Terminal Company to permit the M-K-T to use certain parts of the Terminal Company's facilities and to fix the compensation to be paid for such use under Paragraph (4) of Section 3 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (R. p. 95). It is unnecessary to quote Paragraph (4) in full at this point. It is enough now to say that it authorizes the Commission to require the use of the facilities of one carrier by another, under certain circumstances, and authorizes the Commission, *in the event of a failure of the carriers to agree*, to fix the compensation to be paid "on the principle controlling compensation in condemnation proceedings."

The appellants' intervening petitions will be found at pages 85 to 93 of the record. They are not identical, either in allegations or prayer. The Kansas City Southern's intervention, which is the more elaborate of the two, alleges that the Operating Agreement, under which the railroads entering Kansas City use

and control the facilities of the Terminal Company, is unjust and inequitable through an unfair distribution of capital charges, that discrimination against the appellants, both of whom are parties to the Operating Agreement and who are alleged to be small users of the facilities, results, and that, if the M-K-T is permitted to use the facilities for compensation less than that paid by the proprietary companies, the alleged discrimination will be accentuated, and asks that the Commission "enter upon an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and the terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties" (R. p. 93). The Chicago Great Western's prayer is—"your petitioner further says that if complainant is granted the right to use the facilities of defendant, the compensation therefor to be fixed by this Commission in any amount less than the amounts which complainant would be required to pay under said operating agreements, then that your petitioner is entitled to the same right, and that any order entered herein granting said right to complainant should also grant similar relief to your petitioner" (R. p. 86).

In other words, they ask that the contract existing among the parties be set aside and that a new contract be made by the Commission for the parties, by which their payments for interest and taxes shall be upon an entirely different basis from that to which they have agreed.

The Operating Agreement (R. p. 16) was made in 1909. In 1910, these appellants, by supplemental

agreement, became parties to it (R. p. 64). Thus all of the twelve trunk line railroads entering Kansas City became, in practical effect, the joint owners (through stock ownership and the control provided in the Operating Agreement) of the terminal facilities, which were constructed for the express purpose of accommodating them, and which consist, not only of a union passenger station, but of tracks running for several miles in every direction, over which the trains of the proprietary companies can be brought to the station, freight tracks connecting all of the trunk lines with each other, freight stations, freight yards, a bridge across the Kaw River, an elevated line running through Kansas City, Kansas, and other comprehensive facilities, constituting a completely integrated and unified terminal (R. pp. 209-214). By the Stock Trust Agreement made in 1909 and Supplemental Stock Trust Agreement made in 1910 (R. pp. 136, 162), the stock of the proprietary companies was deposited with a trustee in order to insure the equality of control contemplated by the Operating Agreement, not only for the benefit of the railway companies but for the benefit of the holders of the \$50,000,000 of bonds of the Terminal Company, to secure which the Operating Agreement was pledged (R. pp. 49, 50, 109, 139, 148).

The Missouri, Kansas and Texas Railway Company (predecessor of the M-K-T), as well as the appellants, was a party to these agreements (R. pp. 53, 68, 151, 167). Some years afterwards the Missouri, Kansas and Texas Railway Company went into the hands of a receiver and its property was sold under a decree of foreclosure. The M-K-T was the purchaser at the sale as a result of a plan of reorganiza-

tion (R. p. 95). In accordance with a decree of the Court so permitting, it elected to disaffirm the Operating Agreement and the Stock Trust Agreement (R. p. 95), and, upon making such election, brought the proceeding above referred to before the Interstate Commerce Commission to require the right of use and to have the compensation ascertained under Paragraph (4) of Section 3 of the Interstate Commerce Act, so that, if possible, it could continue the use of the facilities, but be freed from the obligations which the Operating Agreement would have imposed. This was the situation into which the appellants, by their interventions, sought to inject themselves.

The Operating Agreement provided for the construction of the Union Station and all of the other facilities (R. p. 20), for their use by all of the twelve companies for two hundred years (R. pp. 21, 22); for the payment by each of the railway companies of an aliquot part of the interest on the Terminal Company's bonds, taxes and assessments on the Terminal Company's property and the principal of the Terminal Company's bonds at maturity (R. p. 25); for payment of the operating expenses of the Union Passenger Station by the respective companies in proportion to the number of cars and engines using the Union Station facilities (R. p. 32); for the payment by the proprietary companies of the operating expenses of the other portions of the terminal facilities on the basis of the car mileage of the respective companies (R. p. 33); for the division equally among the proprietary companies of the net revenues of the Terminal Company obtained from rentals, concessions, switching, etc. (R. p. 34); for the exclusion of defaulting companies from the privileges of the facilities

(R. p. 43) (in which event the remaining companies would be obliged to pay the defaulting companies' portion of the capital charges (R. p. 26)); and for the pledging of the Operating Agreement with the trustee under the Terminal Company's mortgage, as further security for the bonds issued under the mortgage (R. pp. 49, 50).

The M-K-T sought to have the compensation determined on the basis of fluctuating use (R. p. 95). This basis, as we shall see later, was rejected by the Commission, which held that the statutory mandate requiring the compensation to be determined "on the principle controlling compensation in condemnation proceedings" must be observed. The Commission, however, found that the public interest required the use of the facilities by the M-K-T and, after finding that the parties had been unable to agree on the compensation (R. p. 122), did proceed to ascertain what the Commission found to be just and reasonable compensation.

As to the appellants' interventions, the Commission heard all of the evidence which the appellants had to offer (R. pp. 109, 111), and, also, after hearing the evidence offered by the M-K-T, handed down its report, in which it made its findings as to the public interest involved in the use of the facilities by the M-K-T (R. p. 122), and entered an order dismissing the intervening petitions of the appellants (R. pp. 94, 135). There will, doubtless, be some discussion, particularly as between the appellants and the appellee, Interstate Commerce Commission, as to the effect of this order. It is sufficient to say here that the order does not on its face specify the ground of dismissal. The arguments in that regard are based on what the

Commission says in its report. The Commission was clearly of the opinion that it did not have power to grant the relief prayed by the interventions (R. pp. 112-116).

This suit, in which the judgment appealed from was entered, was instituted, as above stated, for the purpose of reinstating these intervening petitions and requiring the Commission to decide the alleged issues attempted to be raised therein.

Attention is called to the fact that the case was decided on demurrer and, consequently, that the allegations of fact contained in the appellees' answers are admitted.

On page 8 of the statement, appellants state that, since the case was docketed in this Court, "there has been a development in the proceedings before the Commission" and that the Commission has issued a report, dated November 13, 1933, fixing the compensation to be paid by Missouri-Kansas-Texas Railroad Company. It is then stated that the cause still remains before the Commission, pending the filing and determination of petitions for rehearing and the "entry of a final order." While these statements are perhaps outside the record, we do not criticise appellants for making them, as they are of aid to the Court. Having been made, however, it is only fair that their real effect should be stated. The final order has actually been entered since the appellants' brief was filed. Both the report and the order are dated November 13, 1933, but the report was actually promulgated about December 18th, and the order was actually promulgated about January 9, 1934. By the report, the Commission flatly rejected the contention of the M-K-T that com-

pensation should be fixed on the basis of fluctuating use. We quote from the report:

“Both petitioner and respondent concede that just and reasonable compensation must include a reasonable return upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that petitioner should pay upon basis of the relation which its use of the terminal bears to the use by all the using carriers. This has been averaging somewhere in the neighborhood of 5 per cent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual user by those lines. As there are 11 other users, petitioner’s proportion under this basis would be one-twelfth.

“Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property” (Sheets 7 and 8 of Report).

“The user basis as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and in our opinion does not afford a just and reasonable basis. We conclude that the numerical basis in the circumstances of this case affords the just

and reasonable method to be applied'' (Sheet 11 of Report).

“* * * We think that a fair rate of return on the fair value of the property which the petitioner has acquired the right to use will be 6 per cent'' (Sheets 12 and 13 of Report).

“Upon the evidence we find that on and after July 1, 1929, just and reasonable compensation to be paid by petitioner for the use of respondent's terminals required by our order of May 13, 1929, will be that determined upon the following basis: \$184,000 per annum as representing petitioner's proportion of interest on the fair value of the property; one-twelfth of the real and personal taxes on that portion of the terminals of which petitioner has acquired the use, and if the taxes for that portion of the terminals are not separable, then one-twelfth of such percentage of the taxes as the fair value of that portion of the terminals bears to the fair value of the entire terminals, using the final values herein found; interest at 6 per cent per annum on one-twelfth of the amount of additions and betterments properly includible in investment account, in that portion of the terminals which petitioner has acquired the right to use, and petitioner should share to the same extent in reductions in investment account for retirements in the said portion of the terminals; and a proportion of the operating and maintenance charges in each accounting zone covered by the order of May 13, 1929, including such depreciation as is properly includible in the maintenance accounts, equal to the percentage which petitioner's use of such zone bears to the entire use of such zone by all of the using carriers; credit to be given petitioner for one-twelfth of all net revenues from sources other than the using carriers, for rentals, concessions, etc., arising from property in the portion of the terminals which petitioner has acquired the right

to use and which has not been excluded from our valuation. We further find that petitioner's proportion of use of respondent's facilities covered by the order of May 13, 1929, shall be determined in the same manner and by the same methods as were used by respondent subsequent to July 1, 1929, under the terms of the operating agreement for determining the extent of use and the proportion of operating expenses payable by each using line, including petitioner" (Sheets 42 and 43 of Report).

The \$184,000.00 rental fixed by the Commission is slightly more than each proprietary company is obliged to pay towards interest by the provisions of the Operating Agreement.

The pertinence of this order and report which, as appellants say, have developed since the case was docketed in this Court, will appear in the argument.

BRIEF AND ARGUMENT.**I.****The Report and Order of the Commission Have Made This a Moot Case.**

(Throughout the brief italics used in quotations are ours unless otherwise noted.)

Since the Commission has now decided the case against the M-K-T, and has resolved the M-K-T's main contention against it, there is nothing left for this Court to decide. The M-K-T case is closed. It would be useless to order the Commission to take charge of this collateral issue (for collateral issue it must be to have justified the appellants' interventions) when the main case has been finally disposed of. Furthermore, the basis for the filing of the interventions before the Commission by these appellants was that the M-K-T was likely to get an advantage which they were not enjoying, that is, payment of compensation on the basis of actual use (R. pp. 85-93). Since the Commission has decided that the M-K-T cannot enjoy the use on any such method of ascertaining the compensation, the basis, if there ever was any, for the appellants' interventions is destroyed.

II.

The Commission Has No Power under Any Act of Congress to Grant the Relief Prayed by Appellants' Interventions. If Any Statute Attempted to Confer Such Power, It Would Violate the Fifth Amendment to the Constitution.

We brush aside, for the moment, all questions as to whether the Commission did decide the issues, as

to whether the interventions complied with the rules of the Commission, as to whether the issues attempted to be raised could be raised by intervention or could only be raised by an original formal complaint, and proceed directly to the question of the power and jurisdiction of the Commission to grant the relief asked by the appellants in their intervening petitions.

In considering this question, there are certain fundamentals which must be borne in mind:

(1) The Interstate Commerce Commission is an administrative agency of the government (*United States v. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 282 U. S. 311, 324; *Interstate Commerce Commission v. Humboldt Steamship Company*, 224 U. S. 474, 484; *W. A. Hover & Co. v. Denver, etc., RR. Co.*, 17 F. (2d) 881, 884 (C. C. A. 8)). It can exercise only such powers as are given by statute, either expressly or by clear implication (*Chesapeake & Potomac Telephone Company v. Manning*, 186 U. S. 238, 248; *Interstate Commerce Commission v. Los Angeles*, 280 U. S. 52, 67, 68, 69, 70, 71; *Interstate Commerce Commission v. Oregon-Washington River Navigation Company*, 288 U. S. 14, 35). It does not have "almost autocratic powers" as asserted by appellants' brief (p. 43).

(2) The appellants, by their interventions in the M-K-T case, have asked this administrative agency of the government to set aside a contract, by which twelve railroad corporations undertook to settle their proprietary rights in the Terminal's property and in its use for two hundred years, and on the faith and security of which the bonds of the Terminal Company

were issued and sold to the public (see especially Section 2 of Article I, Section 1 of Article II, and all of Article V of the Operating Agreement (R. pp. 21, 25, 49)). They are not asking the Commission to regulate any activity of the Terminal Company as a common carrier, but they are asking that this contract, upon which its very existence depends, without which its First Mortgage bonds would be of little value, and by which the property rights of the various companies in its facilities are established, shall be utterly destroyed.

(3) The destruction of these property and contract rights, if not plainly in violation of the Fifth Amendment, certainly raises grave constitutional questions.

(4) The authority to destroy these property and contract rights must be found in the language of the Interstate Commerce Act, or some other Act of Congress. The power must be conferred in express language or by necessary implication. Vague generalities are not sufficient. It cannot be presumed that Congress intended to defy the Constitution. Only the plainest language, expressing the intent of Congress, should be construed to delegate such an authority to the Commission (*United States v. Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 337; *Lewellyn v. Frick*, 268 U. S. 238, 251).

It, therefore, behooves us to examine the provisions of the Interstate Commerce Act, which are supposed to grant this extraordinary power.

In appellants' intervening petitions filed before the Commission, no specific language of the Act is referred to. The Great Western's intervention (R. pp. 85, 86) refers generally to discrimination, and asks relief similar to that granted the M-K-T, in the event that the Commission should fix the compensation to be paid by the M-K-T in any amount less than it would be required to pay under the Operating Agreement. The Kansas City Southern's intervention (R. pp. 92, 93) refers generally to Section 3, but does not specify what part of Section 3 is relied upon, and merely prays that the Commission "enter into an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties."

In appellants' brief, however, they now claim that their interventions were justified by Paragraphs (1), (3) and (4) of Section 3 (49 U. S. C. A., Sec. 3(1), 3(3), 3(4)). While appellants at pages 22 and 23 of their brief, quote the language of Paragraphs (1) and (3), in their argument they disregard the language. They prefer to deal in vague generalities regarding preferences and discriminations. The exact language of these paragraphs is essential to clear thinking.

PARAGRAPHS (1) AND (3) OF SECTION 3.

Paragraph (1) of Section 3 is as follows:

"(1) That it shall be unlawful for any *common carrier* subject to the provisions of this Act to

make or give any undue or unreasonable *preference* or advantage to any particular person, company, firm, corporation, or locality, or any particular description of *traffic*, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of Section 3 is as follows:

"(3) All *carriers*, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and *equal facilities for the interchange of traffic* between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and *shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.*"

When read together, the intent of these provisions is plain. Abstruse refinements are but confusing.

Paragraph (1) obviously applies only to shippers. Paragraph (3) applies only to other carriers. Paragraph (1) has no application to other carriers. Paragraph (3) has no application to shippers. Both paragraphs have been in the Act since its passage in 1887 in their present form, except that the Transportation Act of 1920 eliminated the last clause of Paragraph (3) as originally written (whose presence might have seemed inconsistent with the new Paragraph (4)), and substituted language prohibiting discrimination in the

distribution of traffic not specifically routed by the shipper. It is axiomatic that these anti-discrimination provisions apply only to those railroad functions which, under the common law or the positive mandates of the Interstate Commerce Act, are imposed upon the railroad company *as a common carrier*. They have no application to a railroad company's exercise of its ordinary *proprietary rights*. This is made plain by the case of *Donovan v. Pennsylvania Company*, 199 U. S. 292, where it was held that a railroad company could make an exclusive contract with a bus and transfer company, and that it need not extend similar facilities to hack drivers generally because it owed no duty, either at common law or by statute, to such hack drivers. The doctrine of this case is firmly established by the decisions of the Supreme Court in *Delaware, Lackawanna & Western R. R. Co. v. Town of Morristown*, 276 U. S. 182, and *Black and White Taxicab Company v. Brown and Yellow Taxicab Company*, 276 U. S. 518.

In *Delaware, Lackawanna & Western R. R. Co. v. Town of Morristown*, *supra*, the Court held unconstitutional an ordinance establishing a public hack stand in a driveway on petitioner's station grounds. The Court says:

“* * * The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment” (l. c. 193).

“There was no duty upon petitioner to accord to other taxicabmen the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business. * * * As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner’s private property and could not be so appropriated in whole or in part except upon the payment of compensation” (l. c. 194).

“* * * To compel the use of petitioner’s land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked” (l. c. 195).

See, also, *Express Cases*, 117 U. S. 1 (exclusive contract with express company); *Railroad Company v. Pullman Company*, 139 U. S. 79 (contract with sleeping car company); *Santa Fe, Prescott & Phoenix Railway Co. v. Grant Brothers Construction Co.*, 228 U. S. 177 (transportation of contractor’s outfit); *Clough v. Grand Trunk Western Ry. Co.*, 155 Fed. 81 (transportation of circus); *Sager v. Northern Pacific R. R. Co.*, 166 Fed. 526 (transportation of circus); *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10, 11 (contract with telegraph company).

In like manner, a railroad company owes no duty to buy railroad equipment from all the manufacturers of railroad equipment, because it has bought from one. It owes no duty to pay Smith a certain price for the coal bought from him because it has already paid that same price to Jones. It owes no duty to sell Brown a worn-out locomotive because it has sold

White a worn-out locomotive. The proposition is so obvious that further illustrations would be superfluous.

Counsel rely upon expressions in opinions of the Supreme Court to the effect that railroads as well as shippers are entitled to impartial treatment. Such language, of course, must be read in its context. In no case has the Court held that one railroad company owes a duty of impartiality to other railroad companies in its proprietary relationships with them, any more than it has held that a railroad company owes a duty of impartiality to merchants in its proprietary relationships with *them*.

In *Pennsylvania Company v. United States*, 236 U. S. 351, cited by appellants, the discrimination was with respect to the specific duties imposed upon the carrier by Paragraph (3) of Section 3.

In *Louisville & Nashville Railroad Company v. United States*, 238 U. S. 1, the discrimination was with respect to "a particular description of traffic," which falls expressly within the inhibition of Paragraph (1) of Section 3.

In the *Chicago Junction Case*, 264 U. S. 258, the language of the Court was used merely to show that a carrier had a sufficient interest to entitle it to a review of an order of the Commission. The order was set aside, not on the ground of discrimination, but on the ground that the bill showed that there was no evidence to support the order.

Chicago, I. & L. Railway Co. v. United States, 270 U. S. 287, is a typical case of discrimination under Paragraph (3) of Section 3. The Lake Erie refused

to establish through route or joint rates for interchange switching charges with an electric railroad. We quote from the Supreme Court's discussion of the effect of the Interstate Commerce Commission's order:

“* * * The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching” (l. c. 290).

In *Colorado v. United States*, 271 U. S. 153, the specific power applied was that contained in Paragraphs (19) to (21) of Section 1, the power to authorize the abandonment of facilities. The discussion with reference to the effect of various factors upon interstate commerce was indulged for the purpose of showing that the power expressly conferred was paramount and that its exercise did not involve an unwarranted incursion into the local affairs of the State of Colorado. The case, therefore, does not afford the slightest foundation for appellants' argument.

Transit Commission v. United States, 289 U. S. 121, did not involve Section 3 at all. It arose under Paragraph (18) of Section 1. The Commission did not exercise jurisdiction to prevent any alleged discrimination. No discrimination was even claimed. It exercised jurisdiction under the express authority of Paragraph 18 of Section 1, which precludes a carrier from extending its line without first securing the authority of the Commission. The Commission held that the extension of a line, by making a trackage contract instead of acquiring title, came within the Act. The

Commission, therefore, was interested in the terms upon which the carrier would acquire such trackage rights just as it would be interested in the price which the carrier might pay to acquire title to a proposed extension.

Cincinnati, etc., Railway Company v. Indianapolis Union Railway Company, 36 F. (2d) 323, likewise has nothing at all to do with Section 3. The court exercised a long-settled equity jurisdiction with reference to the adoption or rejection of contracts by purchasing companies. No question of discrimination was involved.

State ex rel. Lamar v. Jacksonville Terminal Company, 41 Fla. 377, 27 So. 225, obviously does not involve the Interstate Commerce Act. It is a difficult case to read because of the structure of the opinion. Examined closely, however, it reveals that the State Railroad Commission was given express power to require the use of the facilities of terminal companies to be extended to railroads (27 So. 1. c. 230). The language quoted by appellants was used by the court to support this right of the state to require the use. The language itself is misleading unless the context is borne in mind.

Railroad Commission v. Southern Pacific Company, 264 U. S. 331, likewise did not involve Section 3. It arose under Paragraphs (18) to (21) of Section 1, relating to the extension and abandonment of facilities. The Court merely held that the railroad companies could not be required to provide a new union station and extend their main tracks thereto, unless and until the Interstate Commerce Commission should act under

the paragraphs referred to and thus authorize the extension.

In *Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co.*, 271 U. S. 244, the specific power sustained and applied was that given by Paragraphs (18) to (21) of Section 1, giving the Commission power to authorize the construction or extension of lines of railroad. These were the "comprehensive powers" referred to in the extract from the opinion quoted by appellants.

In the *Dayton-Goose Creek Case*, 263 U. S. 456, the Court indeed says, as pointed out by appellants, that the Transportation Act "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission," but this language obviously refers to the extent to which Congress has enlarged the powers of the Commission *by the Act*. It does not mean that the Commission has unlimited powers, or, in fact, any powers other than those given in the Interstate Commerce Act, as amended by the Transportation Act. These powers are broad enough to justify the phrase used by the Court, without twisting that phrase into a grant of still further powers.

The language of Paragraph (4) demonstrates that the general language of Paragraphs (1) and (3) is not to be given any such strained interpretation as appellants seek to give it, for Congress in Paragraph (4) has specifically recognized that equality in compensation and terms for the use of facilities is not necessary, but that the carrier owning the facilities may agree on the terms with the other carrier or carriers involved. In fact the Commission's jurisdiction to fix

the compensation is made expressly contingent on the carriers not being able to agree. If they do agree, the Commission has no jurisdiction under the Act, no matter what variance there may be between the compensation paid by the different carriers.

The conclusion is unavoidable that the sole authority for one carrier's acquiring the use of the facilities of another is to be found in Paragraph (4) of Section 3.

In *Davis v. Pringle*, 268 U. S. 315, the Court held that a provision of the Bankruptcy Act, which in one clause specifically described the priorities to which the United States was entitled, was not to be construed to give additional priorities to the United States by reason of general language at the end of the provision, the Court saying:

“We attach little value to this logical concatenation as against the direct effect of Section 64, taken according to the normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end” (l. c. 318).

So, here, it is incredible that, in view of the specific provision made in Paragraph (4) for the acquisition of rights by one carrier in the facilities of another, and for the machinery to make such acquisition effective, Congress should have intended to smuggle in a general and undefined right to use such facilities by “muffled words” in accompanying paragraphs of the same section—and that, not by definitely inserting such muffled words, but merely by leaving

untouched words which were already in the Act and had been there since 1887, without it having ever occurred to anyone before that they had any such meaning.

If Paragraph (4) opened the terminals of all carriers to all other carriers at the pleasure of the latter, there might be some excuse for contending that the anti-discrimination provisions of Paragraphs (1) and (3) applied. But Congress has done no such thing. Paragraph (4) recognizes that no carrier holds itself out as a furnisher of terminal facilities to all the world, but that its facilities are private property which can be taken by its competitors only upon payment of just compensation. It therefore requires, not the payment of rates for a common carrier service, but the payment of just compensation for property taken. And before the owner can be disturbed in any way, it provides that the Commission must find its disturbance to be in the public interest; and, before the Commission can fix the compensation, it provides that the owner and the proposed user must have failed to agree. In other words, Paragraph (4), instead of prohibiting discrimination, affirmatively contemplates differences in treatment. The public interest might call for the use by one carrier but not by another—a difference. The Commission might require the use by two carriers, and the owner might agree as to the compensation with one and not with the other. The Commission then, following the mandate of the statute, might fix the compensation to be paid by the other carrier at a less or a greater sum than that agreed to between the owner and the first carrier—again, a difference.

The fact is that Paragraph (4) fixes in plain language the conditions under which the Commission

can take jurisdiction and the methods to be followed in fixing the compensation, if jurisdiction is assumed. These provisions are exclusive, and Paragraphs (1) and (3) have no bearing on them whatever.

It is plain that no authority for the annihilation of the Operating Agreement and of the security for this company's bonds is to be found in Paragraphs (1) and (3) of Section 3.

PARAGRAPH (4) OF SECTION 3.

What then of Paragraph (4), which appellants also seek to grasp—though somewhat gingerly, it would appear? The pertinent part of Paragraph 4 is as follows:

“(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of *a carrier owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, *by another carrier* or other carriers, on such terms and for such compensation *as the carriers affected may agree upon*, or, *in the event of a failure to agree, as the Commission may fix as just and reasonable* for the use so required, to be ascertained *on the principle controlling compensation in condemnation proceedings*. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced.”

Paragraph (4) was added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. L. 479). The purpose of Congress, as declared

in latter Act (see 41 Stat. L. 488), was to enable the railroads as a whole to furnish adequate transportation service to the public, not to serve the interests of individual carriers, nor to provide for arbitration of disputes growing out of contractual relationships between carriers. (See *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 585, 589; *New England Divisions Cases*, 261 U. S. 184, 189; *Dayton-Goose Creek Railway Company v. United States*, 263 U. S. 456, 478).

Paragraph (4) requires no interpretation. By its terms, it has no application unless the parties themselves have been unable to agree.

The right to invoke its provisions is extended only to carriers *other* than the carrier owning or entitled to the enjoyment of terminal facilities. A carrier already entitled to the enjoyment of the terminal facilities is thus by direct implication excluded from the category of carriers for whom the enjoyment of the use may be commandeered.

And, even where the use is condemned for the benefit of a carrier not already entitled to its enjoyment, the jurisdiction of the Commission *to fix the compensation* is, by the express language of the statute, wholly excluded where the carriers agree between themselves. The Commission in such case may require the use, but only "on such terms and for such compensation as the carriers affected may agree upon, *or, in the event of a failure to agree*, as the Commission may fix, etc." The failure to agree is thus an express condition precedent to the exercise by the Commission of the power to fix the compensation.

The power of the Commission to determine the terms and compensation for the use, therefore, is con-

fined to those cases where one of the carriers is not entitled to the use and where the carriers have not been able to agree between themselves, either by prior contract or by agreement after the use has been ordered.

The language of Paragraph (4) is not confined to those cases where a condemnation petition is filed by a carrier. The Commission has the power of initiative. It can itself order the use, and then proceed, in the exercise of the power of eminent domain, to fix the compensation if the parties do not agree. Paragraphs (1) and (3) of Section 3 are likewise not dependent on the institution of a proceeding by a private party. The Commission may remove discriminations without application therefor. If Congress had intended to authorize the Commission to fix the compensation for carriers already bound by contract to a different compensation, Congress would not have limited the power of the Commission in the fixing of compensation to those cases where the parties fail to agree, because the parties, if satisfied between themselves with their contract, could completely checkmate any action initiated by the Commission. All they would have to do, after the Commission had ordered the use, would be to agree again upon the compensation to which they had already agreed in the contract.

If Congress had intended to give the Commission the power to set aside contracts already made, and to fix the compensation, regardless of such contracts, it would have made such intention clear, and it would not have left it to be extracted by a process of refined reasoning from provisions which are appropriate for ordinary proceedings in eminent domain as between parties who are unable to agree, and are wholly in-

appropriate to the fixing of compensation by the Commission in disregard of the agreements of the parties.

To paraphrase the language of Mr. Justice Holmes in *Davis v. Pringle*, 268 U. S. 315, 318: It is incredible that, after the use of language appropriate to parties not under contract with each other, Congress should have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

Congress, in the Transportation Act, met a practical situation in a practical way. It knew that many of the railroads of the country had extensive terminals which other companies could not use, and which the public interest might require to be shared. It also knew that there were many other terminals, including all of those owned by the so-called terminal companies, which were already used by a number of carriers under long-time contracts, upon the credit of which bonds had been issued and sold to the public. Congress recognized that the public interest might require that the first class of terminals be opened up to other carriers. The second class were already opened up to other carriers to the extent of the contracts already in effect, and could be opened up still further to accommodate other carriers not having the benefit of such contracts. The language used is appropriate to this end. It is not appropriate to any other.

It shows that the *intention of Congress* was to give the Commission power, when it found it in the public interest, to require the joint use of terminals, where no previous arrangement for such use existed and the parties themselves were unable to agree. Congress just as plainly did not intend to authorize the

Commission to step in where contracts were already in effect providing for the joint use of terminal facilities and the carriers interested were actually making joint use of such facilities—merely because one or more of the carriers might think that the contract which it had made was, perhaps, not as favorable to it as some other contract might have been. Congress intended that the Commission should be in a position *to secure for the public the requisite service*. It did not intend to make the Commission a court of equity to reform existing contracts nor a court of law to settle disputes between the carriers growing out of such contracts.

Let us look at the appellants.

Each of them is already entitled to the use of the facilities by virtue of a contract effective for a period of two hundred years (R. pp. 18, 63, 64). By virtue of the Operating Agreement, the franchise ordinance which is referred to in the Commission's report (R. p. 99), the equitable ownership of the stock of the Terminal Company and the unity of ownership and control effected by the Stock Trust Agreement (R. pp. 137, 162), each of them is also in practical effect the owner of an undivided interest in the entire property of the Terminal Company. In view of the elaborate character of the organization and machinery for control, the Terminal Company somewhat resembles a corporate trustee, holding legal title to the property, with the equitable title in the proprietary companies (Cf. *Chicago, Milwaukee & St. Paul Railroad Company v. Des Moines, etc., Railway Company*, 254 U. S. 196).

It is plain that neither of the appellants (themselves proprietary companies) can be classed as "an-

other carrier," to which Paragraph (4) of Section 3 gives the Commission power to extend the use of terminal facilities. It follows that the Commission has no power to fix the compensation to be paid by them. Its power in fixing compensation is limited to those cases where it requires the use. Where the parties already have the right of use, the statute is silent as to any right to fix compensation. The appellants, therefore, do not come within the class of carriers for which the Commission has the power to fix the compensation to be paid.

If Congress had intended to give the Commission any such power, it would have been perfectly simple to use appropriate language for that purpose. It would have been provided expressly, first, that the Commission should have the power to require the joint use of terminal facilities by any carrier, whether previously entitled thereto or not, and also the power "to revise, readjust or ignore all existing contracts between carriers relating to terminal facilities, and to prescribe the terms and conditions upon which such carriers shall make joint use of the facilities owned by either or all of such railroads, or to the enjoyment of which either or all of such railroads by contract may be entitled, including the payments to be made and the services to be performed by either or all." Congress would not have left such extraordinary powers to be inferred from general language. If Congress had intended to destroy solemn contracts, it would have made that intention plain.

The cases cited from pages 16 to 19 of appellants' brief (Point I (1.)) have no application. While, in some instances, contracts which undertake to control for all the future a matter which falls within the

regulatory police power of Congress will not stand in the way of the exercise of Congress' paramount powers, the rule is not applicable to contracts unrelated to the carrier's duties as a common carrier. Even where they are related to the carrier's duties as a common carrier, they will not be ignored unless they clearly entrench upon an express provision of an act of Congress or upon a power clearly given by an act of Congress. The cases cited by appellants are all of the latter character. The contracts involved undertook to control the action of the carriers in respect to their duties as common carriers and in respect to matters regarding which Congress not only had the power to legislate, but had actually legislated, and had conferred express powers upon the Interstate Commerce Commission.

In *Interstate Commerce Commission v. Los Angeles*, 280 U. S. 52, the Court held that the Interstate Commerce Commission had no power to require the construction of a union station by railroad companies. After various attempts to bring about the construction of a union station, the City of Los Angeles brought a proceeding before the Interstate Commerce Commission, asking that the railroads be ordered by the Commission to construct and use such a station. The Commission held that it was not empowered by Congress to make such a requirement. The Supreme Court of the United States denied mandamus. The Court construed various general provisions of the Act, which it was claimed conferred the power, and held that a power of this character, affecting as it would the important property interests of the railroads, must rest upon express language, and

that it could not be fabricated out of general expressions. The Court says:

“In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, *there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise*” (l. c. 67).

* * * * *

“There are cases in the state courts in which by virtue of statutory provision railroads are required expressly to unite in a passenger station, if determined by Commissioners appointed by the Court or by a Railroad Commission. * * *; but there is no federal case in which is built up out of such words as those, which we find in the Transportation Act of 1920, authority for requiring such a station.

Without more specific and express legislative direction than is found in the Act, we can not reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, *that power we should expect to find in congressional legislation*” (l. c. 67, 68).

* * * * *

“A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to

have been left to be implied from varied regulatory provisions of uncertain scope. It would be a monumental work and one requiring the most extensive exercise of expert engineering and railroad construction. It would make possible great changes of much importance in the plans of every city and in the rearrangement and mutations of railroad property and public and private business structures everywhere. *We find no statutory preparation for the organization of such machinery*" (l. c. 69).

* * * * *

"If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. *The suggestion of complainants is that out of provisions for local union of main tracks and switching tracks we should use our imaginations and develop them into provisions for giant union passenger stations*" (l. c. 70).

Interstate Commerce Commission v. Oregon-Washington River Navigation Company, 288 U. S. 14, involved an order of the Interstate Commerce Commission, which required the Oregon-Washington River Navigation Company "to extend its line of railroad now terminating near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade Line of the Southern Pacific Company at or near Crescent Lake, Oregon" (l. c. 22). The Court held that the order exceeded the Commission's powers and should, therefore, be set

aside. The Commission had based its order upon Paragraph (21) of Section 1 of the Transportation Act (49 U. S. C. A. Sec. 1 (21)), which, along with Paragraphs (18) to (20) of Section 1 forbidding extensions, construction of new roads or abandonments without the order of the Commission, was added by the Transportation Act of 1920 (41 Stat. L. 456, 476). By Paragraph (21), the Commission was given power to require any carrier "to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this chapter, and to extend its line or lines." The Court held that the phrase, "and to extend its line or lines," must be construed in its context, that the extensions mentioned had to do with car service, and that the clause was not intended to create a wholly independent subject of jurisdiction. The Court says:

"* * * In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, *if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service.* As said in *Interstate Commerce Commission v. United States ex rel. Los Angeles*, 280 U. S. 52, 70, 50 S. Ct. 53, 57, 47 L. Ed. 163:

'If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far

clearer and more direct than in the present meager provisions of the Transportation Act.'

Moreover, if the purpose were that claimed by the Commission, support should be found in legislative history. But none has been called to our attention'' (l. c. 35, 36).

* * * * *

“There is another consideration which supports the construction adopted. Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score” (l. c. 40).

So here the appellants have not pointed to any legislative history nor any reports of committees dealing with the Transportation Act of 1920, which in the slightest degree support their interpretation of Section 3.

In *State of Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, it was held that Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to control the abandonment of an intrastate railroad, whose situation and ownership were such that interstate and foreign commerce could not be burdened or affected by a discontinuance of its business. The Court says with reference to the paragraphs of the Act relied on:

“* * * They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they

are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. * * * And *had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared.* This was not done" (l. c. 217, 218).

In *Chesapeake and Potomac Telephone Company v. Manning*, 186 U. S. 238, l. c. 248, the Court says:

"Again, while a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so *no interference will be adjudged beyond the clear letter of the statute.*"

Furthermore, it is apparent from reading the appellants' intervening petitions that they are not really seeking a remedy under Paragraph (4) of Section 3. They do not want an order requiring their use of the facilities and the ascertainment of compensation "on the principle controlling compensation in condemnation proceedings." They want something very different. They want a revision of the Operating Agreement and a readjustment and reapportionment of the fixed charges among the various proprietary companies.

They ask for an order which will place the use and terms of use "on a fair, just and equitable basis among such parties in accordance with and in proportion to the use made thereof by the various parties" (intervening petition of the Kansas City Southern, R. p. 93).

ACT SHOULD NOT BE SO CONSTRUED AS TO RAISE GRAVE CONSTITUTIONAL QUESTIONS.

Even if there were ambiguity in the language, there would be no difficulty in reaching its proper interpretation. To interpret it as appellants advocate would at once raise grave constitutional questions.

We expect to show later that they would be insuperable. It is enough here that they are serious. It is a thoroughly settled principle of statutory construction that an interpretation which would render a statute unconstitutional or of doubtful constitutionality will never be adopted if any other interpretation is permissible (*United States v. Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 217).

"Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind" (*Lewellyn v. Frick*, 268 U. S. 238, 251).

"We do not discuss the question whether it (Congress) could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent" (*Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 337).

If Congress had intended to confer upon the Commission the right to destroy contract relationships between railroad companies, upon which their rights of property are established, and upon the faith of which

money for the construction of facilities has been borrowed from trusting investors, Congress would have so provided. It would not have left any such extraordinary power to be inferred from language authorizing the condemnation of trackage rights generally, nor from general language directed against discrimination by carriers.

**APPELLANTS' CONSTRUCTION RENDERS ACT IN
VIOLATION OF FIFTH AMENDMENT.**

The construction put upon the Act by appellants makes the Act unconstitutional. It plainly amounts to a deprivation of the property of this appellee, of the other proprietary companies, and of the holders of the bonds sold by the Terminal Company.

“* * * *The powers possessed by the Commission are delegated by Congress under, and are to be exercised in conformity with, the constitutional grant of authority to regulate interstate and foreign commerce*” (*United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 282 U. S. 311, l. c. 324).

“* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353” (*Adair v. United States*, 208 U. S. 161, l. c. 180).

OPERATING AGREEMENT IS PROPERTY.

(a) The Operating Agreement is a contract which establishes valuable proprietary rights as between the parties to it, and unquestionably is property (*Adkins v. Children's Hospital*, 261 U. S. 525, 545; *Coppage v.*

Kansas, 236 U. S. 1; *Allgeyer v. Louisiana*, 165 U. S. 578; *Missouri-Kansas-Texas R. R. Co. v. Oklahoma*, 271 U. S. 303; *United States v. Chicago, etc., Railroad Company*, 282 U. S. 311, 327; *Green v. Edwards*, 31 R. I. 1, 77 Atl. 188; *People v. Kempner*, 139 N. Y. S. 440 (affirmed 208 N. Y. 16, 101 N. E. 794); *Western Massachusetts Co. v. Hilton*, 58 N. Y. S. 996).

Of course, it is possible that Congress might authorize the taking of contract rights as well as physical property for public use, but, in such event, the Fifth Amendment would require that just compensation should be ascertained and paid for the destruction of the contract rights (See *Offield v. New York, etc., Co.*, 203 U. S. 372, where a statute authorizing a railroad company to condemn the interest of a minority stockholder was considered; see also *Monongahela Navigation Company v. United States*, 148 U. S. 312; *Adair v. United States*, 208 U. S. 161; *United States v. Chicago, etc., Railroad Company*, 282 U. S. 311).

The parties to the Operating Agreement would, therefore, be entitled to compensation for the acquisition or destruction of their property rights.

The Act, however, contains no provision for condemning contract rights nor providing compensation therefor, and appellants, by their interpretation of the Act, deny that the Act contemplates their condemnation or the payment of compensation for them.

BONDHOLDERS ENTITLED TO DUE PROCESS OF LAW.

(b) The trustee in the Terminal Company's First Mortgage is a party to the Operating Agreement, and the Operating Agreement has been assigned to and pledged with the trustee by all of the parties to the Operating Agreement as security for the First Mortgage bonds of the Terminal Company (R. pp. 18,

49, 53). The contract rights of the bondholders are vested rights, and the cases above cited under the preceding point apply equally here.

In addition, neither the trustee in the mortgage nor the bondholders were parties to the proceeding before the Interstate Commerce Commission and could not be made parties since the Interstate Commerce Act gives the Commission jurisdiction only over carriers. It does not give the Commission jurisdiction over the private rights of individuals, banks and other corporations.

The first principle of due process of law is notice and an opportunity to be heard (*Davidson v. New Orleans*, 96 U. S. 107; *Hagar v. Reclamation District*, 111 U. S. 708; *Coe v. Armour Fertilizer Works*, 237 U. S. 413).

In *Coe v. Armour Fertilizer Works*, *supra*, the Court says, with reference to the Fourteenth Amendment:

“which requires at least a hearing or an opportunity to be heard in order to warrant the taking of one’s property (l. c. 423).

* * * * *

“Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires (l. c. 424).

* * * * *

“ ‘This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace’ ” (l. c. 425).

Due process of law in the Fifth Amendment has the same meaning as in the Fourteenth Amendment (*Twining v. New Jersey*, 211 U. S. 78, 101).

Even if the trustee and the bondholders had had notice, their interest in the mortgage is property, which is protected by the due process clause and cannot be taken without just compensation. "It is fundamental that a mortgage or trust deed securing an indebtedness is 'property' within the meaning of the Constitution of the United States" (*Illinois Trust & Savings Bank v. City of Des Moines*, 224 Fed. 620, 621).

In *Bradley v. Lightcap*, 195 U. S. 1, the Supreme Court says, with reference to the contract rights of a mortgagee:

"Confessedly, subsequent laws which in their operation amount to the denial of rights accruing by a prior contract, are obnoxious to constitutional objection * * * (l. c. 19).

"But, reading the Act as the view of the Supreme Court compels us to do, as taking away her right to maintain her possession, we are of opinion that it materially impairs the obligation of her contract and deprives her of property without due process" (l. c. 24).

Appellants' argument (pages 36 and 37 of their Brief) that it makes no difference to the bondholders whether the Operating Agreement is maintained or not, is palpably fallacious. The bondholders are entitled to the full benefit of the covenant of *every party* to the Operating Agreement that it will pay the principal and interest of the bonds, even if every other party should be insolvent or out of existence (see Article II, Section 1 of the Operating Agreement, especially Paragraphs (a), (b) and (f) (R. pp. 25, 26)). They are entitled to hold the Kansas City Southern and the Chicago Great Western, which are solvent

companies, for the full amount of their proportionate part of principal and interest (R. p. 26), and their proportionate part, or the whole, of any amount which may be payable on account of the default of any other company (R. p. 26). They cannot be relegated to a claim upon whatever amount the Terminal Company may happen to collect from the M-K-T or some company in the hands of receivers. They are entitled to the full benefit of the covenants of the parties which made them.

COMMISSION CANNOT EXERCISE STRICTLY JUDICIAL POWER.

(c) An attempt to remake the Operating Agreement as between the parties and as to the trustee would amount to a reformation of the contract.

Article III, Section 2, of the United States Constitution reposes in the judicial power all controversies "in law and equity." Only a court of equity has power to reform a written contract (*Lumber Underwriters v. Rife*, 237 U. S. 605).

The legislative branch of the government could not, without violating this constitutional provision, extend this power to an administrative tribunal (*Kilbourn v. Thompson*, 103 U. S. 168).

III.

Mandamus Does Not Lie for Other Reasons.

The order actually entered by the Commission is merely an order of dismissal. It does not recite that the dismissal is for want of jurisdiction (R. p. 135). The record furnishes support for a conclusion that the Commission did actually exercise jurisdiction, even though the report of the Commission finds no statutory power to grant the relief prayed.

The dismissal may also be justified because the intervening petitions did not comply with Rule II (1) 3 of the Rules of Practice of the Interstate Commerce Commission, which expressly provides:

“Leave will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them.”

The appellants are also guilty of laches sufficient to preclude them from relief by mandamus.

However, we leave these questions for discussion by other appellees, as we submit that the Commission was wholly without power to grant the relief prayed and that mandamus should be refused on that ground.

IV.

Conclusion.

On the whole record, it is plain that the Commission was without statutory power to grant the appellants the relief asked for in their intervening petitions, that if any Act of Congress had attempted to grant such a power, it would be clearly unconstitutional, and that mandamus does not lie against the Commission. The judgment of the Supreme Court of the District of Columbia should, therefore, be affirmed.

Respectfully submitted,

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IN THE

Court of Appeals of the
District of Columbia

APRIL TERM, 1933.

No. 6068

SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA, ex rel. CHICAGO GREAT
WESTERN RAILROAD COMPANY, and THE KANSAS CITY
SOUTHERN RAILWAY COMPANY,

Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILWAY COMPANY, et al.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

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AND PACIFIC RAILWAY COMPANY, et al.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

MAY IT PLEASE THE COURT:

Briefs have been filed herein by appellees Interstate Commerce Commission, Kansas City Terminal Railway Company, and The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Rock Island and Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, and Missouri Pacific Railroad Company. These briefs have presented argument which requires some reply.

In addition to argument upon the real issue in the case, which is the question of the Commission's jurisdiction, some minor points are raised in some of the briefs. We shall first deal with these points.

I.

APPELLANTS HAVE NOT BEEN GUILTY OF LACHES IN THIS CASE
AND THE WRIT SHOULD NOT BE DENIED ON THAT GROUND.

The brief of the Commission, at pages 45, *et seq.*, devotes some space to the argument that the delay of appellants in starting this action constitutes such laches as to justify this Court in sustaining the judgment of the lower court, and there is similar suggestion at page 42 of the brief filed by the Terminal Company.

There are two sufficient reasons why laches should not prevail as a defense to this action. The first is that in no answer filed by any appellee is the defense of laches raised. In some jurisdictions it may not be necessary to raise this defense in an answer (See *Moore v. Nickey*, 133 Fed. 289, 293; *Sullivan v. Portland*, 94 U. S. 806, 811), but in the District of Columbia the practice and pleading is largely prescribed by a code, which in Section 213, Title 24, under Part II, Mandamus, provides:

“The defendant, by the day named in such order, unless for cause shown the court shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit.”

Laches is essentially a defense and it would seem to follow that since it was not set up as such in any answer filed herein, it may not now be urged as justifying the decision of the lower court.

A further complete answer to the claim of laches ap-

pears upon the face of the facts. It is true that considerable periods of time elapsed between the steps taken in the proceedings before the Commission and in court. The report of the Commission was made on November 10, 1925 (Rec., 94), and from that time until the spring of 1931, nothing was done in the case before the Commission by any party (Rec., 10). Appellants' petitions for rehearing were filed with the Commission in April and May, 1931, and were denied on June 1, 1931 (Rec., 10). The petition in this case was filed May 31, 1933 (Rec., 2). Laches cannot be claimed in this Court because of appellants' delay in filing petitions for rehearing with the Commission, so that the claim must be based upon the lapse of two years between the denial by the Commission of appellants' petitions for rehearing and the starting of this action.

The controlling circumstance is that during this period there was no change whatever in the conditions under which the property of the Terminal Company was used by appellants and the railroad appellees (Rec., 5, 6, 11, 240, 241). As is stated in the record (Rec., 241) the same basis of payment prevails now as in 1925. It follows that no appellee has been prejudiced by appellants' failure to start this suit at an earlier date, and this being so, the doctrine of laches has no application. If any such damage has resulted, it has been imposed upon appellants and the other smaller users of the Terminal Company's facilities.

It is well settled that the mere passage of time does not constitute laches. *Bunch v. United States*, 252 Fed. 673, 677, 678; *Spiller v. St. L. & S. F. R. Co.*, 14 Fed. (2d) 284, 288, affirmed 274 U. S. 304; *Kansas City Southern R. Co. v. May*, 2 Fed. (2d) 688, 689; *Southern Pacific Company v. Bogert*, 250 U. S. 483, 448-490. There is no

statute of limitations applicable to the action which appellants seek to compel and, this being true, laches has no function. *Bunch v. United States*, *supra*; *Williamson v. Monroe*, 101 Fed. 322; *Broatch v. Boysen*, 175 Fed. 702, 707; *Brun v. Mann*, 151 Fed. 145, 154.

Moreover, appellants now have and in the past have had a continuing right to a decision by the Commission upon the merits of issues presented to it, and under these circumstances it has been held that the doctrine of laches does not apply. *Amy v. City of Galena*, 7 Fed. 163, 166; *United States v. Board of Auditors, etc.*, 28 Fed. 407, 409; *Bedgisoff v. Cushman*, 12 Fed. (2d) 667, 668. In cases where lapse of time has not prejudiced any party to the litigation, the claim of laches has been uniformly unsuccessful. *Chapman v. Douglas*, 107 U. S. 348; *Chiswell v. Johnston*, 299 Fed. 681, 689; *Spiller v. St. L. & S. F. R. Co.*, 14 Fed. (2d) 284, 288; *Kansas City Southern R. Co. v. May*, 2 Fed. (2d) 688-689.

A decision of this Court affirming the order of the lower court on the ground of laches would preclude a determination by this Court of the Commission's jurisdiction, and since it may at least be claimed that the Commission has the jurisdiction claimed for it, such a decision might well deny to appellants that justice to which they are entitled. The doctrine of laches should never be applied when its application operates to defeat justice. Thus in *Bunch v. United States*, 252 Fed. 673, 677, the court said:

“The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice.”

On this point see also: *Williamson v. Monroe*, 101 Fed. 322, 330; *Spiller v. St. L. & S. F. R. Co.*, 14 Fed. (2d) 284, affirmed 274 U. S. 304; *Kansas City Southern R. Co. v. May*, 2 Fed. (2d) 688, 698; *Brun v. Mann*, 151 Fed. 145.

Appellants have never acquiesced in the wrong which they claim was inflicted upon them. From November 10, 1925, when the Commission's report was issued, until March, 1931, no action was taken by any party to the case instituted by the Missouri-Kansas-Texas Railroad, nor did the Commission set the case down for hearing. In May, 1931, appellants filed their petitions for rehearing, reasserting their claimed rights and refuting any claim of acquiescence by them in what the Commission had done. *Southern Pacific Company v. Bogert*, 250 U. S. 483.

Thus, every consideration points to the conclusion that the claim of laches now presented to this Court should be overruled, not only because it is a defense not available to appellants under the pleadings, but also because the facts do not justify its application. If it is sustained, appellants may perhaps be denied legal rights, the present recognition of which will impose no burdens upon appellees which would not have been imposed upon them had such rights been recognized as long ago as 1925.

In its brief, the Commission has cited some cases said to support its argument, but all of these cases are distinguishable upon the facts. Thus, in *Arant v. Lane*, 249 U. S. 267 (p. 46, Commission's brief) the allowance of the writ might have required the double payment of salaries, thus imposing an unrecoverable loss upon the Government. *In the Matter of Eastern Cherokees*, 220 U. S. 83, the fund with respect to which the writ was sought had been almost entirely distributed and the allowance of the writ might have caused the Government to make double payments.

In *Ex Parte American Steel Barrel Company*, 230 U. S. 35, the petitioners delayed their petition from April, 1912, until February, 1913, during which time the judge

whose jurisdiction was attacked had exercised continuous jurisdiction, making many orders and rulings in respect of which it was claimed the lack of jurisdiction existed. In *United States v. Blair*, 293 Fed. 846 (p. 47, Commission's brief) the allowance of the writ would have created what this Court described (p. 848) as "endless and needless confusion" and the real purpose of the tax laws would have been measurably defeated.

Nor is there anything in the facts stated in the Commission's brief (p. 47) which affects the conclusion this Court ought to reach. The issue of additional securities by the Terminal Company subsequent to November 10, 1925, is wholly irrelevant. As we pointed out in our main brief (pp. 36, 37), there is nothing in the relief requested by appellants from the Commission which would affect in any way the security of any bonds issued by the Terminal Company.

Nor has the delay prejudiced the Commission. It is true that since this case was decided in the lower court the Commission has made an order in the proceedings before it. It is equally true, however, that any further hearings before the Commission which might have been necessary on the issues now raised by appellants, would have been largely on issues of law, and would have been necessary no matter when appellants' right to such hearings might be established. This results from the fact that the relief requested by appellants is based upon somewhat different legal principles than those upon which the Missouri-Kansas-Texas based its claims.

We submit that the decision in *Thorpe, et al. v. William Filene's Sons Co.*, 40 Fed. (2nd) 269, states the rule to be applied in this case. The case at bar is an action at law, and in the case cited, it is held that the doctrine of laches has no application to actions at law

since it is only a defense to the extent that it creates an estoppel. Continuing, the court said at page 269:

“The basis of estoppel is deceptive or misleading conduct by the plaintiff on which the defendant has relied to his injury. *Simmons v. Burlington, etc. Rwy. Co.*, 159 U. S. at page 291, 16 S. Ct. 1, 40 L. Ed. 150; *Ward v. Sherman*, 192 U. S. 168, at page 177, 24 S. Ct. 227, 48 L. Ed. 391. Mere delay by the plaintiff may constitute such laches as will deprive him of equitable relief, but I am aware of no case in which it has been held to constitute a defense to an action at law, except, of course, under the statute of limitations.”

Again, on page 270, the court said, referring to the actions of the plaintiffs in the suit before it:

“They have, however, on the defendant’s own affidavits done nothing active to mislead or deceive it, nothing which would justify saying that their conduct has been so deceptive as to make it inequitable to permit their action to be pressed. They are much like persons who have watched a trespasser go to and fro over their property for many years without making efforts to stop him, and who at last take action. The principle of estoppel has never been extended to such cases. To do so would amount to amending the statute of limitations.”

The claim of laches was accordingly overruled, and the same action should be taken in the case at bar.

II.

THE CASE IS NOT MOOT.

It is faintly suggested by the Terminal Company (p. 11 of its brief), that since the Commission has made an order in the proceedings before it, which order disposes of the issues raised by the Missouri-Kansas-Texas Railroad Company, this case has become moot. No authorities are cited in support of the suggestion and no such argument is made by any other appellee.

We submit that the entry of an order does not make this case moot. The decision of the Commission is not final in the sense that a court judgment becomes final. It is not actually a judgment. It is always subject to rehearing, on petition or on the Commission's own motion, and may always be set aside and the proceeding reopened. Moreover, the rights asserted by the appellants in their intervening petitions to the Commission were peculiar to them, and they are entitled to an adjudication of those rights regardless of what may have been done with respect to the claim of the Missouri-Kansas-Texas Railroad Company.

The application of the Missouri-Kansas-Texas Railroad Company to acquire the right to use the facilities of the Terminal Company involved a number of questions. One was whether the Missouri-Kansas-Texas Company should use the Terminal Company's facilities except in conformity with the provisions of the operating agreement between the Terminal Company and the companies using its facilities. Another was the question of whether the Operating Agreement was fair to the Missouri-Kansas-Texas Company. Another, raised by the intervention of the small users, was whether the Operating Agreement was fair to the small users, that is, whether the charges imposed upon them were unduly discriminatory against them. Another question raised by appellants was whether the Missouri-Kansas-Texas Company could acquire the right to use the Terminal Company's facilities on terms more favorable than were imposed upon the small users. Appellants and the other small users were directly interested in the answers to each of these questions, and the evidence in the case bore directly upon them.

It will be observed that while appellants were interested in the answers to all the foregoing questions, the

Missouri-Kansas-Texas was not directly interested in the decision of any issues except those raised by its application. So far as appellants were concerned, the issues in which they were interested were raised by their intervening petitions, and we lay aside the suggestion of the Terminal Company (p. 42 of its brief) that the dismissal of those petitions was justified because they unduly broadened the issues. The petitions were received and filed, and were not dismissed because of noncompliance with any rule of the Commission.

The Commission has now decided the issues on the application of the Missouri-Kansas-Texas Company, and it has also held that it had no jurisdiction to grant the relief prayed for by the small users, including appellants. If it has such jurisdiction, it is its duty under the intervening petitions, and upon its own motion as well, to hear and determine the question as to whether there is a discrimination in favor of the large users and against the small users of the Terminal Company's facilities. Until this question of jurisdiction has been determined the case is not moot, so far as appellants' rights are concerned. It has been held in many cases that where an intervening petition in an action at law or in equity is dismissed on the ground that it does not state a cause of action, the intervener may review such judgment on a writ of error. *United States v. Northwestern Development Co.*, 203 Fed. 960; *In Re Michigan Central R. R. Co.*, 124 Fed. 727; *Illinois Steel Company v. Ramsey*, 176 Fed. 853; *Automobile, etc. Corp. v. United States*, 39 Fed. (2d) 288.

We do not cite these cases on the theory that this mandamus case is a proceeding to review a decision made by the Commission on the merits. On the contrary, we contend there has been no decision on the merits, and we only wish an order compelling the Commission to

make one. The cases are cited for the purpose of showing that where a party has been permitted to intervene in a case, and a decision has been made against him, he has a right to pursue any proper remedy in the proceeding in which he was permitted to intervene. He does not lose that right because there may have been no appeal by the original parties in the proceeding. This is also true in litigation involving orders of the Commission. In *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.*, 288 U. S. 14, the right of the Commission, an intervener in the lower court, to a decision on the merits, was upheld, although the United States, the statutory defendant, had refused to appeal.

Also, as we have said, it is a legal obligation of the Commission to compel the discontinuance of charges made by a carrier which are unduly discriminatory in favor of some carriers and against other carriers. There is presented in this case, therefore, a question of public interest. It is the duty of the Commission to investigate such a question, and if it fails to perform its duty on the assumption that it has no jurisdiction, the right of an intervener to such an investigation and a decision thereon ought not be denied on the ground that the case has been disposed of on other issues. 4 C. J. 576, Notes 81-82-83, Sec. 2383; *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498; *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290.

If the Commission should hear appellant's claims on their merits, a decision would require little or no additional evidence. A complete record has already been made and any further hearings would relate almost entirely to questions of law. A decision disposing of this case on any issue other than that of the Commission's

jurisdiction would require a repetition of all steps taken in the proceedings up to this time. Such procedure would cause substantial delay, large expense, and would serve no good purpose.

III.

THE COMMISSION DECLINED TO TAKE JURISDICTION AND REFUSED TO DETERMINE THE ISSUES PRESENTED BY APPELLANTS' INTERVENING PETITIONS.

This point is dealt with in our main brief at pages 10 to 15, inclusive, and is an important matter for determination. The powers of a court in connection with the issuance of writs of mandamus are immaterial under the facts in this case. What the Commission actually did is to be drawn from what is said in its report of November 10, 1925. That report seems to us to conclusively demonstrate that there was no decision on the merits, but at pages 19 to 23, inclusive, of the Commission's brief, it is nevertheless argued that the Commission adjudicated the merits of the issues presented by appellants' intervening petitions filed with it.

All of the other appellees agree in effect, that the Commission denied its jurisdiction and have filed briefs supporting the argument that it did not have jurisdiction. In the brief of the Terminal Company, at page 41, it is said:

"The record furnishes support for a conclusion that the Commission did actually exercise jurisdiction, even though the report of the Commission finds no statutory power to grant the relief prayed."

This is a contradiction in terms, as a decision on the merits could not have been made in the absence of statutory power to proceed. On page 7 of the same brief it is said, citing pages 112 to 116 of the record, that the

Commission was clearly of the opinion that it did not have power to grant the relief prayed by the interventions, and on the same page it is said that the case was decided on demurrer, which necessarily means that there was no decision on the merits. The brief concludes with the statement (p. 42) that the Commission did not have statutory power to grant the relief requested by appellants.

Similar statements appear in the brief filed by the other railroad appellees. At page 6 thereof it is said that the Commission determined that it could not grant the relief sought by appellants. At the bottom of page 13 and on page 14 of the same brief there is a denial of power in the Commission. The heading on page 24 denies power in the Commission to grant the relief requested by appellants, and in conclusion, it is said at page 40 that the Act to Regulate Commerce does not confer upon the Commission power to grant such relief.

It only remains to deal with the argument made by the Commission with respect to this point. This argument consists entirely of assertion, in so far as the report of the Commission is concerned. There is no reference to any language in the Commission's report supporting the claim that it exercised jurisdiction, nor is there any explanation of the repeated statements in the report that the Commission was unable to find in the law authority to deal with the issues presented to it by appellants.

The claim advanced apparently is that by construing the law in such fashion as to deprive itself of jurisdiction, the Commission assumed jurisdiction. Such an argument defeats itself and confuses a construction of law made in the exercise of jurisdiction and which construction of law compels the refusal of relief, and a construction of law which prevents the exercise of jurisdiction.

A construction of law made in the exercise of jurisdiction but which compels the refusal of relief is illustrated in *B. A. & P. Ry. Co. v. United States*, 290 U. S. 127, cited by the Commission at pages 22 and 23 of its brief. In that case, the law specifically conferred jurisdiction upon the Commission to determine the amount of the deficit, if any, to which the railroad was entitled. This determination of fact required a construction of the word "deficit". The Commission took jurisdiction of the case, and in the exercise of such jurisdiction first construed the appropriate statute in such a way that the complaining railroad was held entitled to a payment which was actually made. Thereafter on rehearing it was held to have been entitled to no payment.

As the court points out (p. 136), in dealing with that case on the merits, "the Commission was required to decide many things besides the meaning of the term deficit or the amount thereof." Construing and applying the appropriate statute was merely one element which entered into the determination of the amount to which the railroad was entitled. As the court further said (p. 142), referring to the particular act under which the Commission was then proceeding:

"Under this legislation whether a claimant seeking relief has a requisite standing is a question going to the merits and its determination is an exercise of jurisdiction."

No such situation is presented in the case at bar. In this case all the Commission did was to hold that under the law it could not consider the merits of appellants' claims. That is precisely what it did in *Interstate Commerce Commission v. Humboldt Steamship Company*, 224 U. S. 474, which case illustrates a construction of law which prevents the exercise of jurisdiction. In that case, as in this one, the Commission received a petition

and then held that the statute upon which the claim was based did not authorize it to exercise jurisdiction. Speaking of what the Commission there did, the court said that there might be a jurisdiction to determine the possession of jurisdiction, and with reference to the duties and obligations of the Commission further said at page 484:

“It may act of its own motion in certain instances,—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed?”

Continuing, the court said at page 485:

“In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the court of appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission ‘to take jurisdiction of said cause and proceed therein as by law required.’ In other words, to proceed to the merits of the controversy, at which point the Commission stopped,”

because it held that the statute gave it no jurisdiction to proceed. Precisely the same situation obtains in the case at bar, for here also the Commission only gave to appellants’ contentions that consideration which it thought necessary in order to conclude, as it says (Rec., 116) that it was unable to find the requisite power or authority in any provision of the act to go further in the case. Such consideration, however, did not constitute an exercise of jurisdiction. In *Miguel v. McCarl*, decided by the Supreme Court of the United States on March 5, 1934, the court approved the holding in *Roberts*

v. *United States*, 176 U. S. 221, that every statute requiring action by an officer requires construction to some extent, but that such construction does not make the obligation to act less mandatory.

We submit that the Commission may not now be heard to defend this case upon the argument that it decided the proceedings before it on the merits. The language of its own report must control, and, as we have pointed out, it is significant that all parties to this case, except the Commission, agree in effect that the conclusions of the Commission were based upon a finding of no jurisdiction; in fact, the briefs of all other appellees are entirely directed to the proposition that the Commission was right in holding that it did not have such jurisdiction.

IV.

THE LAW CONFERRED UPON THE COMMISSION POWER AND JURISDICTION TO DETERMINE THE ISSUES RAISED BY APPELLANTS' INTERVENING PETITIONS FILED WITH IT.

The real issue in this case is the power and jurisdiction of the Commission, and this question is seriously argued in each of the three briefs filed on behalf of appellees. All of these briefs, however, fall into the error of confusing the issues in this case with the merits of the case presented to the Commission. Because of this, much of the argument presented by appellees is based upon the alleged iniquity of appellants in seeking to escape, so appellees say, from the obligations of a contract executed by them. Whether or not this action is so iniquitous as to debar appellants from relief on the merits remains to be seen. In any event it is not a matter for decision in the case at bar.

As a branch of the argument made by them, appellees persist in saying that appellants are asking the Commission to revise the Operating Agreement and insist that the Commission has no such power. (p. 3 of Terminal brief; p. 19 of Railroad brief.) We dealt with this matter at pages 18 and 19 of our original brief, where we pointed out that this view, also adopted by the Commission, is a mistaken one. The Commission may not have power to rewrite the Operating Agreement, but the point is immaterial, for if a discrimination exists in fact, it cannot be justified by the existence of that agreement. Our position in this respect is well set out in the dissenting opinion of Commissioner Eastman (Rec., 129).

It is further argued that the Commission has no power to disturb the present Operating Agreement as it is a property right, and that such action on its part would deprive the Terminal Company and the other users of its facilities of their constitutional rights. This matter is dealt with at pages 16 to 19, inclusive, of our main brief. It will be observed that the Commission itself did not base its decision on this ground, inasmuch as it held (Rec., 114) that if it had jurisdiction to proceed, the existence of the contract would not deprive it of that jurisdiction. The doctrine of the cases cited by us in our main brief has been reaffirmed as recently as March 5, 1934 by the United States Supreme Court in the case of *Nebbia v. New York*, No. 531 of the October term 1933, in which case the court said:

“Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contracts rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his

freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Nothing is better settled than the principle that if the Operating Agreement produces a discrimination against the small users of its facilities, the existence of that agreement will not justify the continuance of such discrimination.

Appellees also confuse the status of appellants as owners of stock of the Terminal Company with their status as common-carrier users of its terminal facilities. As we have pointed out (p. 20 of our main brief) there is no necessary relation between the two. There are many instances of one railroad owning the stock of another railroad, but using no part of its facilities. Appellees' argument seems to be that since appellants own part of the capital stock of the Terminal Company, they have thereby become obligated to pay the same part of its taxes and interest, a theory of corporate law which is at least novel. No cases are cited in appellees' briefs in support of this proposition, and it rests upon assertion of counsel.

To show how far afield appellees argument has taken them, we refer to the statement on page 17 of the brief for the Santa Fe, where it is said that if the measure of investment and ownership were placed upon a user basis, the voting power of each proprietary line would change monthly with the use it made of the terminal facilities. It is then said that the Commission has no power to make an order producing such a result. So far as we know, no one has ever suggested such a result. It is original with counsel. At no time have the railroads at Kansas City made the same percentage use of the facilities of the Terminal Company, yet by virtue of their equal ownership of stock, each railroad has an equal voice in its management. They would continue to have the same

voice, for the same reason, if the interest and taxes of the Terminal Company were distributed on a user basis, as its operating expenses are now and have always been distributed.

There is also considerable argument by appellees that if the Commission has the jurisdiction which we claim, and if it should exercise it as we claim it should be exercised, there will be a serious prejudice to the holders of the securities of the Terminal Company who were not parties to the litigation before the Commission. Thus, at pages 40 and 41 of the brief for the Terminal Company it is said that the bondholders are entitled to the covenant of every party to the Operating Agreement that it will pay the principal and interest of the bonds, even if all other parties should be insolvent. Perhaps sufficient has been said on the point (pp. 36, 37, our main brief), but we repeat that there is no occasion for the solicitude shown by appellees for the bondholders. The bonds of the Terminal Company and the interest on those bonds, as well as the taxes, are payable by the Terminal Company, and so long as they are paid, it is no concern of the bondholders or tax collectors where the money comes from. If the charges of the Terminal Company, including its interest obligations and taxes, are paid by the users of its facilities on a user basis, the bondholders and taxing bodies will receive their money just as certainly as if those charges were paid on a numerical basis.

Furthermore, as has been pointed out by all parties to this case, the Operating Agreement provides that if a default is made by any user of the Terminal Company facilities in the payment of amounts that it should pay, it loses its right to use the facilities, and the other users must make up the deficit. Thus, if default were made by every user of the facilities of the Terminal Company

except appellants, they would have to pay all the obligations of the Terminal Company, so long as they were able, either on a user basis or on a numerical basis. Appellants have never proposed any change in this situation. The security of the bonds and other obligations of the Terminal Company is equally good, no matter on what basis or how the Terminal Company acquires the money with which to pay those obligations.

There is also some argument, at pages 24 to 28, inclusive, of the brief filed by the Commission, to the effect that a decision of the Commission on the merits, made in the exercise of its jurisdiction, may not be corrected through mandamus. The argument is based upon the assumption that in its report of November 10, 1925, the Commission passed upon the merits of appellants' claim. This is an error in fact, and since the Commission did not pass upon the merits of appellants' claims, the point is not in issue.

With respect to the power of the Commission under paragraph (4) of Section 3, it is argued by all appellees that the Commission does not have the jurisdiction for which we contend because, as stated by the Commission at page 30 of its brief:

"The provisions for compensation and the methods which are prescribed for fixing it all indicate that the allowance of the use by the owning carrier is involuntary."

In the brief of the Terminal Company, it is said (p. 25) that rights under the paragraph can only be invoked by a carrier not entitled to the use of terminal facilities. In the brief of the other railroad appellees, it is said (p. 9) that the paragraph does not apply to a carrier having ownership of and the right to use terminal facilities, and that there must be a failure to agree upon terms and conditions of use. Appellees err, however, in as-

suming that involuntary use means only physical use. A use of terminal property by another railroad than the owner may be involuntary on the part of the owning railroad, not because it is unwilling that the using railroad shall actually run its engines over the terminal property, but because the payment therefor, in the opinion of the owning railroad, is insufficient. This was precisely the issue before the Commission in *C. & A. R. Co. v. T. P. & W. R. Co.*, 146 I. C. C. 171, cited at page 35 of our main brief. It was also the only issue presented by the application of the Missouri-Kansas-Texas Railroad Company to the Commission in the litigation which gave rise to this case. The Terminal Company was at all times willing that its terminal facilities should be used by the Missouri-Kansas-Texas Railroad. The only point of difference between them was the amount to be paid for such use, and that was the only real issue submitted to the Commission and decided by it.

Even if paragraph (4) of Section 3 of the act contemplates the use of compulsion upon the owner of the terminal facilities, this compulsion may be with respect to compensation as well as with respect to physical use. Doubtless appellants will always be afforded the right to use the facilities of the Terminal Company, provided they pay the amounts required by the Operating Agreement, but no argument has been presented which justifies the conclusion that the required compulsion may not result from a fixing of compensation as well as from a requirement of physical use.

And as the matter now stands, there is no real agreement between appellants and the other railroads at Kansas City with respect to the use to be made by appellants of the facilities of the Terminal Company because of the existing disagreement as to the payment to be made for such use. True, appellants signed the operating agree-

ment, but they now assert its unfairness and illegality, just as the Missouri-Kansas-Texas Railroad did.

With respect to the jurisdiction of the Commission under paragraph (1) of Section 3, the only argument is that this paragraph does not relate to the relations between railroad companies (Commission brief, p. 44; Terminal brief, p. 15; Railroad brief, p. 25). It is said to relate only to the relations between shippers on the one hand and railroads on the other hand, and the Commission's conclusion to this effect (183 I. C. C. 771) is cited in the Commission's brief (p. 45).

The plain words of the paragraph do not sustain this conclusion. The paragraph prohibits any common carrier from making or giving any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or from subjecting any particular person, company, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect. The Terminal Company is certainly a common carrier subject to the act, and it is equally certain that appellants are corporations. If, therefore, the present arrangement at Kansas City as between the Terminal Company on the one hand and appellants on the other, subjects appellants to any undue or unreasonable prejudice or disadvantage in any respect, it would seem plain that the Commission has full jurisdiction to deal with the matter. On this point, there is no occasion for adding anything to the language of Commissioner Eastman in his dissenting opinion (Rec., 126). True, the Commission may find that no such discrimination or prejudice exists, but that is for it to determine on the merits. Deciding that question is not an obligation resting upon this court.

With respect to paragraph (3) of Section 3, the argu-

ment made by appellees concedes that the paragraph applies to the relations between railroads, but goes to the point that the jurisdiction which we say the Commission has is of so unusual and far reaching a nature that it must have been specifically conferred in appropriate language; that in the absence of such language such power does not exist. We submit that this argument is not well founded; in fact, it is based upon an entire misconception of the position occupied by appellants and of the power which we asked the Commission to exercise. To support the argument, appellees cite the *Los Angeles Case*, 280 U. S. 52, the *Oregon-Washington Railroad & Navigation Company Case*, 288 U. S. 14, and the *Eastern Texas Railroad Company Case*, 258 U. S. 204.

Those cases have no application to the case at bar. In all of them substantial new rights were claimed to have been conferred upon the Commission, not in express terms but by implication and inference. The powers which the Commission was claimed to have were of the broadest type and were new in every sense of the word. Sustaining the Commission's jurisdiction in those cases would have conferred upon it powers far in excess of any that it had theretofore claimed or exercised; powers which would have given it control over the expenditure of vast sums of money; powers which would have constituted a clear infringement upon the right of a corporate management. No such situation is presented in the case at bar.

Paragraph (3) of Section 3 has not been changed since the enactment of the Act to Regulate Commerce. Among other things, it definitely prohibits a discrimination in rates, fares and charges as between common carriers subject to the act. No one has ever contended that if such discrimination exists in fact, the Commission does not have power to prohibit it. The power has been ex-

exercised so many times that it is surely beyond dispute. It matters not how the discrimination arises or upon what basis it rests. If it is a violation of the law, a matter which the Commission has power to determine, that body has power to order its discontinuance. There is nothing new or startling in such an exercise of jurisdiction. As is said in the *Los Angeles Case*, 280 U. S. 52, at page 62, the Commission, while denying its jurisdiction, was careful to point out that no question of discrimination or preference had been presented to it.

Appellees apparently concede this, as they must, but seek to negative the concession by arguing that even if a discrimination exists, an order requiring its removal would be invalid, because it would require a change in the present method of paying the interest and tax charges of the Terminal Company, as fixed by the Operating Agreement, thus depriving appellees of their constitutional rights. The argument assumes the sanctity of the Operating Agreement under all circumstances, a conclusion not supported by the law.

It is further suggested that the "rates, fares and charges" referred to in paragraph (3) of Section 3 of the act are only those required to be filed with the Commission in tariffs under Section 6, and that since the charges under the Operating Agreement are not so filed, any discrimination resulting from their imposition cannot be corrected by the Commission. This argument also rests only upon the assertion of counsel and is bad in reason. Appellees' theory apparently is that the discrimination of which we complain, if there is such a discrimination, cannot be prohibited because it results from the operation of a contract. This conclusion again assumes the sanctity of the Operating Agreement under all circumstances and is in plain contradiction of the law.

The purpose of the Act to Regulate Commerce was to eliminate every form of discrimination and inequality (see cases cited at p. 23 of our main brief). There is no exception of discrimination resulting from the operation of contracts for the use of terminal facilities. As stated by the court in the *Transit Commission Case*, 289 U. S. 121, 125, the Commission has declared that

“the reasonableness of a joint facility rental is a matter of public interest, as well as one affecting the operations of the carriers.”

The joint facility rental there in question was established by contract and not by tariff, just as in the case at bar. Thus, the argument of appellees on this point creates an exception not contained in the statute; limits the application of the law to a field much narrower than that which the Supreme Court has said it occupies, and gives to the Operating Agreement an immunity which it cannot possess under the law.

CONCLUSION.

As we have said, the argument presented by appellants on the issue of the Commission's jurisdiction so confuses the facts to be passed on by the Commission with the law relating to its jurisdiction that it is difficult to sort out that part of the argument which should be answered to this Court. The only point here involved is whether or not the Commission has jurisdiction. There is no issue as to how it should exercise that jurisdiction.

The question of appellants' alleged laches and the claim that the case is moot are minor issues, susceptible of complete answer. Certainly, they should not control the decision herein. That the Commission did deny its jurisdiction is admitted, in effect, by all parties except

the Commission, and definitely appears from the language of its report.

There remains the real question of whether it has jurisdiction under paragraphs (1), (3) and (4) of Section 3 of the act. On this issue we submit that the language of those paragraphs is convincing when considered in connection with the numerous decisions of the Supreme Court stating the purposes of the Act to Regulate Commerce and sustaining the Commission's jurisdiction in all cases where the jurisdiction was necessary to effectuate the purposes of the law. Particularly is it convincing when it is considered that jurisdiction has been exercised by the Commission in cases similar in principle, and was apparently not exercised in this case because of a confusion of thought into which the majority of the Commission fell.

We submit that the decision of the lower court should be reversed and the issuance of the writ required.

Respectfully submitted,

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